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No. 227

IN THE

Supreme Court of the United States

TWIN PORTS OIL COMPANY, A CORPORATION,
Petitioner,

vs.

THE PURE OIL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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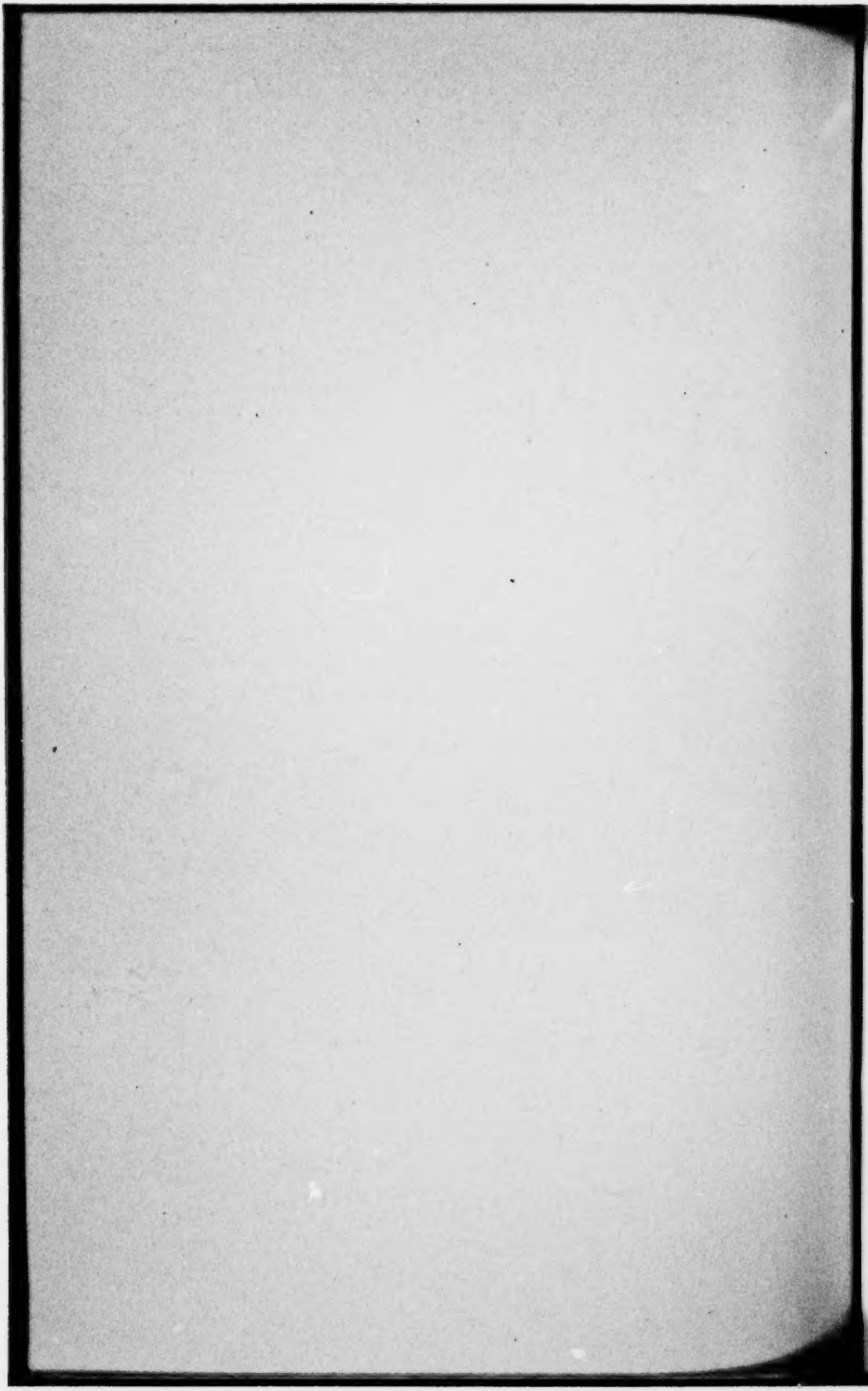

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Supreme Court of the United States:

Comes now the Twin Ports Oil Company and respectfully shows to this Court:

1. That the matter involved herein is the right of Petitioner to recover damages for injury to its business and property because of a violation by Respondent of the Sherman Anti-Trust Law. The violation consisted of a conspiracy to raise and fix prices of gasoline, of which conspiracy Respondent was duly convicted (*United States vs. Socony-Vacuum*, 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811). The conspiracy placed a "floor" under the market prices of gasoline, because of which an illegal exaction of 2¼¢ per gallon was made in the sale, under an exclusive franchise contract, of large quantities of gasoline by Respondent to Petitioner, this contributing to Petitioner's ruin and putting it out of business.

2. That Petitioner was an oil jobber at Duluth and was

purchasing gasoline from the Respondent under an exclusive contract, by which it could purchase and sell only the gasoline produced by Respondent, prices being determined by the averages of quoted sales appearing in certain trade publications, over which Petitioner had no control.

3. That while Petitioner was operating under such exclusive contract, Respondent, among others, criminally violated the Sherman Anti-Trust Law, in that it raised and fixed prices of gasoline and put a floor under the market prices of gasoline in the so-called Mid-Continent Field or Standard of Indiana territory. Because of the conspiracy, Petitioner could not purchase in a free and open market; it was forced to pay 2¼ cents more per gallon for one million seven hundred thousand (1,700,000) gallons of gasoline than it would otherwise have paid and as a proximate result of the conspiracy Petitioner was placed in such a situation that its property, of the undisputed value of $100,000.00 to $115,000.00 was lost. Respondent "took" (143) the property, giving Petitioner only $45,000.00 therefor. The property Respondent "took" (143) consisted of a bulk plant and nine filling stations (121), scores of gasoline station pumps, much equipment, and a going and profitable business in the city of Duluth, Minnesota, all wholly lost to Petitioner because of the conspiracy.

4. That in addition to the illegal exaction of 2¼¢ per gallon of gasoline sold to Petitioner and in addition to its property which Respondent "took" (143), Respondent also received, paying nothing therefor (159), the good will of Petitioner, built up as a jobber of gasoline in the city of Duluth, Minnesota, covering the years from 1921 to March, 1936.

5. That Petitioner was forced out of business because of the conspiracy herein and Respondent took over, and was up

to the time of the trial of this action, using and operating Petitioner's bulk station, filling stations, pumps, property and equipment, operating the same as a going business.

6. That upon the trial of this action in the District Court of Minnesota, a recovery for the illegal exaction of 2¼ cents per gallon, the loss of Petitioner's bulk plant, stations and equipment, and its good will was denied, and a verdict directed in favor of Respondent, on the ground that Petitioner had not suffered *any* damage because the illegal exaction "was passed on to the retailer" (254), which action of the District Court the Circuit Court of Appeals affirmed in an opinion handed down May 20, 1941 (334). Judgment was entered against said Petitioner on said 20th day of May, 1941 (344-345), and it is to review such judgment that this petition is presented.

7. That the case was tried under the illegal exaction rule enunciated in *Chattanooga Foundry Co. vs. City of Atlanta*, 203 U. S. 390, 51 L. Ed. 241, 27 S. Ct. 65; *Thomsen vs. Cayser*, 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353, and *Straus vs. Victor Talking Machine Co.*, 297 Fed. 791. That the defense was that the illegal exaction was "passed on to the retailer" (254), a defense not allowable under *Southern Pacific vs. Darnell*, 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186, and *Adams vs. Mills*, 286 U. S. 397, 76 L. Ed. 1184, 52 S. Ct. 589, and that the opinion of the Circuit Court runs counter to all of the cases set forth in this paragraph.

8. That said judgment of the Circuit Court of Appeals is final; that the same is erroneous and that this Honorable Court should require this cause to be certified to it for review and determination, pursuant to law.

9. That by reason of the judgment of the Circuit Court of Appeals Petitioner, who has been injured in its business and property, has not received any compensation therefor,

and has been unwittingly deprived of its right to a trial by jury herein.

BASIS FOR JURISDICTION OF THIS COURT

That the judgment sought to be reviewed is that of the Circuit Court of Appeals for the Eighth Circuit herein, entered on the 20th day of May, 1941 (344-345).

That this Court has jurisdiction to review the judgment in question for the reason that this action is based upon the violation of the Sherman Anti-Trust Law, being the Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A., Sec. 1, *Mason's United States Statutes*, Title 15, Sec. 15, as amended by the Act of October 15, 1914, c. 323, Sec. 4, 38 Stat. 731, providing for recovery in civil actions, being as follows:

> "SUITS BY PERSONS INJURED: AMOUNT OF RECOVERY.—Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

It was not disputed in the courts below that the right of Petitioner to recover arose and was governed by the Sherman Anti-Trust Law.

Petitioner claimed a right of recovery because of the illegal exaction of 2¼ cents per gallon of gasoline it purchased, under the doctrine of this Court in *Chattanooga Foundry Co. vs. City of Atlanta, supra.*

Petitioner contended, in the language of the Chattanooga case, that it was "led to pay more than the worth of the pipe" (gasoline).

SUMMARY OF FACTS

The Twin Ports Oil Company was organized in 1921 by Axel Friedman, Milan Lubratovich and one Vercelline (117-118). These three gentlemen each put $5,000.00 into the oil jobbing company (139), they built up a substantial business. The money volume done by Petitioner until it was forced out of business was as follows:

Year		
1922	$153,000.00	
1923	236,000.00	(138)
1924	293,177.00	(139)
1925	323,562.00	(139)
1926	291,690.00	(139)
1927	291,931.00	(140)
1928	303,927.00	(140)
1929	338,447.00	(140)
1930	335,656.00	(140)
1931	308,833.00	(140)
1932	300,961.00	(140)
1933	252,589.00	(140)
1934	320,639.00	(141)
1935	326,365.00	(141)
1936 (3 mos.)	64,348.00	(141)

Upon this business gross profits were made (before deductions for bad debts, depreciation, etc.) ranging from $49,767.00 to $93,833.00 per year. Substantial net profits were made ranging from $5,692.00 in 1927 (140) to $27,362.00 in 1930 (140).

The evidence showed without dispute that Petitioner's bulk plant and its nine filling stations (121), pumps, and equipment had a value of $100,000.00 to $115,000.00 when Respondent "took" it (143). The trial court refused Petitioner permission to express an opinion as to the value of its good will (159).

When Petitioner was forced out of business, Respondent

allowed it $45,000.00 for its property, but it did not pay it in cash. It dribbled the payments out over a period of many months on the basis of 1¢ a gallon for the gasoline handled by the Respondent, with the equipment which it took away from Petitioner. Part of the $45,000.00 was paid by a cancellation of an indebtedness, part dribbled out as above (159).

During the period covered by Petitioner's claim, being the years 1935 and 1936 up to March 1, the Petitioner purchased of Respondent, under the exclusive contract, approximately 1,700,000 gallons of gasoline (127, 143).

This exclusive contract or franchise sales agreement provided that:

> "* * * the Buyer agrees to purchase from the Seller exclusively all the gasoline * * *" (264).
>
> "* * * the Buyer shall not at any time or under any circumstances whatsoever sell any gasoline, kerosene, lubricating oils or petroleum products other than those which Buyer purchases from the Seller" (264).
>
> "The price of * * * gasoline supplied under this agreement shall be the *average spot market price determined* by taking the *prices* for like materials *published* daily in Platt's Oilgram, Tulsa edition, and the Chicago Journal of Commerce" (265).

ILLEGAL EXACTION

Conviction Not Disputed. Floor Placed Under Market.

The judgment of conviction made *prima facie* evidence of the conspiracy by the provisions of the Sherman Act, was not disputed (112).

The uncontradicted evidence showed that by reason of the conspiracy a "floor" of 2¼¢ per gallon was placed under the tank car gasoline market in 1935 and 1936 (228-236).

By reason of this "floor" an unlawful exaction of 2¼¢ per

gallon was made by defendant on every gallon of gasoline purchased by plaintiff and plaintiff paid more than it otherwise would have. It sustained a damage on *this branch* of the case of 1,700,000 x 2¼¢ or $38,250.00.

Recovery for the illegal exaction was sought under *Chattanooga Foundry Co. vs. City of Atlanta; Thomsen vs. Cayser* and *Straus vs. Victor Talking Machine Co., supra.*

Jobber's Position Unique.

The jobber had nothing to say about the price he paid for gasoline; neither did he have anything to say about the price he sold it for. The price the jobber paid for gasoline was determined by the sales at Tulsa, as shown by the averages of the quotations as they appeared in the Chicago Journal of Commerce and Platt's Oilgram (265).

What the Conspiracy Was: Buying Programs.

Briefly, the conspiracy consisted of major oil companies getting together and buying up the gasoline of the independent companies.

The purpose of buying this gasoline was to keep it off the market and to "stabilize" prices.

In 1935 the major oil companies in the Mid-Continent Field bought from the so-called Independents from 600 to 900 cars of gasoline per month (227).

They bought up approximately 8,800 tank cars of gasoline from Independents in the East Texas Field in 1935 (227).

In 1935 and 1936 they purchased about 50% of all the gasoline manufactured by independent companies in the Mid-Continent and East Texas Fields (227-228).

Effect of the Buying Programs.

These buying programs had the effect of "stabilizing" or "holding up" gasoline prices, *making jobbers pay more* for their gas than they otherwise would have paid, according to the final judgment of guilt, interpreted and read in the light of the opinion in the criminal case, *United States vs. Socony-Vacuum*, 310 U. S. 150, 198, 84 L. Ed. 1129, 1155, 60 Sup. Ct. 811, 833.

Expert Testimony—Not Objected to—Undisputed.

After the general nature of the business was shown (108-111) and after it was shown that the plaintiff was a jobber, working under an exclusive contract with the Pure Oil Company (261), and after the final judgment of guilt of a conspiracy in violation of the Sherman Law was shown, plaintiff called the one main, pivotal and only witness it had and the only witness it relied upon, to *basically* show what *effect* the conspiracy had upon prices (221-228-236).

After a lengthy, full and complete qualification of Petitioner's expert witness, the following testimony was given:

"Q. Now, based upon this vast experience that you have detailed here, I will ask you if as an oil man you have an opinion as to the effect of the buying programs upon the tank car prices f.o.b. Group III, during 1935, from March until April, 1936? Have you such an opinion?

A. Yes.

Mr. Searls: That is the spot market price?

Mr. Michel: Yes.

Q. What is that opinion?

A. Well, my opinion is that *the buying program put a floor under the market,* the tank car market of 2¼¢ per gallon.

Q. During that period of 1935 to 1936?

A. Yes, sir" (228).

Use of the Word "Floor."

The word "floor" is used in the witness' testimony. This word is common to oil men and appeared much in Madison Case No. 1. Mr. Justice Douglas, in his opinion in *United States vs. Socony-Vacuum Oil Company,* 310 U. S. 150, 84 L. Ed. 1129, 60 Sup. Ct. 811, used this term. For instance, he said, "A 'floor' was placed and kept under the spot markets. Prices rose and jobbers and consumers in the Midwestern area paid more for their gasoline than they would have but for the conspiracy" (quotation 84 L. Ed. 1129, 1166, 310 U. S. 150, 220, 60 Sup. Ct. 811, 843).

Justice Douglas also spoke of the "placing of a floor under the spot markets," on the same pages above. He also spoke of the "maintenance of a 'floor' under the market."

While this term "floor" has a well known meaning with oil men, counsel for plaintiff re-called Mr. Cox to clarify and explain the meaning of the word "floor." We quote from the record:

> "By Mr. Michel:
>
> Q. Mr. Cox, this morning you used the term—which may be perfectly understandable to you in the oil business, but I don't know that it is to the Court and jury definitely—in answer to my question as to the effect of the buying program in 1935 and 1936 upon the tank car prices at Group III, you said it had the effect of *placing a floor* of 2¼ cents on it. Tell the jury what you mean by the word 'floor.'
>
> A. I mean that it would have been—the price would have been—the tank car market price would have been 2¼ cents *under* what it was.
>
> Mr. Michel: That is all" (236).

Petitioner purchased 1,700,000 gallons of gasoline, paying this illegal exaction of 2¼ cents per gallon therefor.

TESTIMONY UNDISPUTED

The facts as above given appear from the testimony *without objection* and *without dispute* (228-236). The fact of the conviction of Respondent of a violation of the Sherman Anti-Trust Law, which conviction was upheld by this Court (*United States vs. Socony-Vacuum,* 310 U. S. 150, 84 L. Ed. 1129) *was not disputed.* The testimony of John Cox that the effect of the buying programs was to place a *floor of* 2¼¢ *under the market was not disputed* (228-236).

PETITIONER'S THEORY

When the action was *first* started the question of *margins* was involved, but this question *was not in the case as it was tried.*

The Petitioner tried the case upon the theory of *Straus vs. Victor Talking Machine Co.,* 297 Fed. 791; *Thomsen vs. Cayser,* 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353, and *Chattanooga Foundry Co. vs. City of Atlanta,* 203 U. S. 390, 51 L. Ed. 241, 27 Sup. Ct. 65, all Sherman Act cases. The general holding of these cases is that *plaintiff had a right to purchase goods in a free and uncontrolled market,* which if *invaded by the defendants* gave to plaintiff a right to recover the illegal exactions.

> "Plaintiff had the right to purchase Victor goods in a *free market.* This right was *invaded* by defendants, and plaintiffs were *forced to buy* in a *closed* market, *created* and *held* by the *illegal combination.*"
>
> *Straus vs. Victor Talking Machine Co., supra.*

> "The City * * * by reason of the *illegal arrangements* between the members of the trust" purchased "at a *price much above what was reasonable* or the pipe was worth. The purchase was made after a *simulated* competition at a price *fixed* by the trust."
>
> "The facts gave rise to a cause of action under the

Act of Congress. The City * * * was injured in its property * * * by being led to *pay more than the worth* of the pipe. * * * The *fact* that *defendants* and others had *combined with* the seller *led to* the *excessive* charge."

Chattanooga Foundry vs. City of Atlanta, 203 U. S. 390, 51 L. Ed. 241, 27 S. Ct. 65.

See also *Thomsen vs. Cayser, supra.*

DIRECTED VERDICT: LOWER COURTS' POSITION

The trial court *conceded the conspiracy and conceded that prices were illegally increased* (253), but, being of the opinion that the increase "*was passed on to the retailer*" (254) held that the Petitioner could not recover.

> "It is *uncontradicted* in the evidence that the *price* of gasoline to the *jobber* as a *result* of this *conspiracy* was *increased*, but it is also uncontradicted in the evidence that the retail price of gasoline assumed a corresponding increase, at least in so far as the Twin Ports Oil Company was concerned, and that any increase to the Twin Ports Oil Company in the price of gasoline *was passed on to the retailer*" (Statement Trial Court, 253-254).

This was one of the two most glaringly erroneous statements of the trial court. This statement was *not* quoted in the opinion of the Circuit Court of Appeals.

The trial court also erroneously held that damages had to be shown to a reasonable *certainty* under the Sherman Act (255).

The Circuit Court of Appeals agreed with the trial court that because the *illegal exaction was or could have been passed on to the retailer,* Petitioner could not recover (342).

Petitioner's Position.

Petitioner took the position as to this defense that, the conspiracy having been shown, and the "floor" or illegal exaction being proven, *without objection,* and appearing without contradiction, the law *did not go beyond the first step* and that what occurred *after* the *illegal exaction* was *of no consequence to the wrongdoer,* under the rule in *Southern Pac. vs. Darnell,* 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186, and *Adams vs. Mills,* 286 U. S. 397, 76 L. Ed. 1184, 52 S. Ct. 589. The Circuit Court *refused to follow* the rule in the Darnell and Adams Cases (342-343).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals for the Eighth Circuit decided an important question of Federal Law, to-wit: The right to recover damages because of a conceded violation of the Sherman Anti-Trust Law, arising out of the conviction of major oil companies in the so-called Madison cases. The decision is on an important question of Federal Law which has not been but should be settled by this Court.

2. The Circuit Court held that if the undisputed and undenied illegal exaction, due to the conspiracy, was or could have been "passed on to the retailer," that constituted a *defense* and Petitioner could not recover for the illegal exaction, which holding is contrary to the decisions of this Court in *Adams vs. Mills,* 286 U. S. 397, 76 L. Ed. 1184, 52 Sup. Ct. 589; *Southern Pac. vs. Darnell,* 245 U. S. 531, 62 L. Ed. 451, 38 Sup. Ct. 186.

3. The Circuit Court, while conceding that "passed on to the retailer" was *not* a defense under the Interstate Commerce Act, considered in *Southern Pacific vs. Darnell* and *Adams vs. Mills,* erroneously held that a *different and more*

restrictive rule of construction should be applied to the Sherman Anti-Trust Law than was applied to *similar* provisions of the Interstate Commerce Act, considered in *Adams vs. Mills* and *Southern Pacific vs. Darnell, supra.*

4. That a construction of the Sherman Act, as to when damages are allowable thereunder, is involved in this action.

5. The Circuit Court erred in failing to apply the rule announced by this Court in *Chattanooga Foundry Co. vs. City of Atlanta,* 203 U. S. 390, 51 L. Ed. 241, 27 Sup. Ct. 65, wherein this Court said that "where a combination of sellers caused prices of certain piping to a city *to be raised,* in violation of the Sherman Anti-Trust Law, the City could *recover the excess,*" and that the city was "injured in its business and property" by reason of the *unlawful increase* in the prices.

6. The Circuit Court judgment is contrary to the opinion of this Court in *Thomsen vs. Cayser,* 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353, a rate case under the Sherman Act—*not* the Interstate Commerce Act, wherein this Court said:

> "The plaintiffs *alleged* a *charge over a reasonable rate* and the *amount* of it. If the charge be true that *more than a reasonable rate* was *secured* by the combination, the *excess* over what was reasonable *was an element of injury.*"

7. The opinion of the Circuit Court of Appeals is contrary to the decision of the Circuit Court of Appeals of the Second Circuit in *Straus vs. Victor Talking Machine Co.,* 297 Fed. 791, *supra,* a somewhat similar case.

8. The Circuit Court of Appeals erred in distinguishing between the Interstate Commerce Act and the Sherman Act and *Southern Pacific vs. Darnell* and *Adams vs. Mills* and the present case. It erred in holding that recoverable dam-

ages were permitted under the Interstate Commerce Act because under that Act they were *definite* and *specific* and the losses were fixed (343), but that the Sherman Act was *more restrictive* and required *more definite* proof, contrary to the decisions of the Supreme Court of the United States as follows:

> "The measure of damages was the *pecuniary loss* inflicted on the plaintiff as the result of the rebate paid. Those damages *might* be the *same* as the rebate, or *less than* the rebate, or *many times greater* than the rebate; but unless they were proved, they could not be recovered. *Whatever they were* they could be recovered."
>
> *Penn. R. Co. vs. International Coal Min. Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 S. Ct. 893.

> "There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss."
>
> *Meeker vs. Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed. 644, 35 S. Ct. 328,

The holding was also contrary to the rule as to *liberality as to damages* in *Story Parchment vs. Paterson Parchment Paper Co.*, 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248.

9. The Circuit Court was in error in its opinion as to *definiteness* as to damages under the Interstate Commerce Act, in that if definiteness be a requisite to recovery under the Sherman Act the testimony of John Cox as to the 2¼ cents illegal exaction provided *a basis* for the jury *to reach* a definite figure, and such figure, *if reached* by the jury, would constitute the *same* definiteness held existent by the Circuit Court of Appeals under the Interstate Commerce Act.

10. The Circuit Court of Appeals was unduly and im-

properly *technical and failed to give effect to the liberal rule of damages* in Sherman Act cases, laid down by this Court in *Story Parchment vs. Paterson Parchment Paper Co.*, 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248.

11. The Circuit Court of Appeals was *overly* and *unduly technical* and *violated the spirit of the New Rules of Procedure* in construing the pleadings and stipulation too technically, particularly in view of the fact that evidence of the conviction of the conspiracy (112-113-114) and the placing of a floor of 2¼ cents under the market was received without objection (228-236) (Rule 8, c. 1; Rule 15, b, Rules of Civil Procedure for the District Courts of the United States).

12. The Circuit Court of Appeals was in error in *failing to give effect to the evidence* as it appeared in the case, without dispute, and *to treat the pleadings*, if necessary, *as amended to conform to the evidence* under Rule 15, b, of the Rules of Civil Procedure for the District Courts of the United States.

13. The Circuit Court failed to give effect to Rule 8, f, "All pleadings shall be so construed as to do substantial justice," and to Rule 8, e, "No technical forms of pleading or motions are required," and failed to follow the *liberal trend* as to *pleadings* in cases under the Sherman Act, as appears from the decision of this Court in *Stevens vs. Foster*, 61 S. Ct. 210, and as appears in *Balanbanoff vs. Kellogg*, 118 Fed. (2d) 597, and *Fyfe vs. Pan-Atlantic S. S. Corp.*, 114 Fed. (2d) 72, and *Venuto vs. Robinson*, 118 Fed. (2d) 680-683, and *Holiday vs. Johnston*, 61 Sup. Ct. 1015, decided May 26, 1941.

14. The decision of the Circuit Court of Appeals, unless reversed, will weaken the Sherman Anti-Trust Law, for that the Circuit Court wholly failed to give effect to the opinion

and position of this Court as stated by Mr. Justice Pitney in *Texas & Pacific Ry. Co. vs. Rigsby,* 36 Sup. Ct. 482, 241 U. S. 33, 60 L. Ed. 874:

> "For the *consequences* that follow a *breach* of the *law* are *vital* and *integral* to its effect as a *regulation of conduct,* liability to *private suit* is or may be as *potent a deterrent* as liability to *public prosecution.*"

15. The Circuit Court failed to note the error of the District Court that damages "must appear by a reasonable certainty" (255), said statement of the trial court being erroneous under the rule stated in *Story Parchment vs. Paterson Parchment Paper Co.,* 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248.

16. The judgment of the Circuit Court places an undue burden upon plaintiffs in actions under the Sherman Act and requires plaintiffs "to prove perhaps more than was necessary."

Straus vs. Victor Talking Machine Co., 297 Fed. 791.

17. The Court failed to give effect to the fundamental purpose of the Sherman Act and its beneficent purpose, as announced by Mr. Justice McReynolds in *Ramsay vs. Associated Billposters,* 260 U. S. 501, 67 L. Ed. 368, 43 Sup. Ct. 167.

18. The Court failed to give effect to the liberal and basic rule as to damages in cases under the Sherman Act as laid down by this Court in *Eastman Kodak Company vs. Southern Photo Material Co.,* 273 U. S. 365, 71 L. Ed. 684, 47 S. Ct. 400.

19. The Court failed to consider the decisions of the Supreme Court of the United States in Sherman Anti-Trust Cases, failed to follow the trend of the decisions and failed

to give effect, generally, to the opinions of this Court in ten cases, which cases will be set out and hereafter referred to in Petitioner's Brief.

20. That in failing to apply the liberal rule of damages laid down by this Court in many cases, particularly the *Eastman Kodak Case*, 273 U. S. 365, 71 L. Ed. 684, and the *Story Parchment Case*, 282 U. S. 555, 75 L. Ed. 544, the Circuit Court left Petitioner "unshorn of justice"; uncompensated for the illegal exaction of 2¼ cents per gallon, permitted it to lose its property and business without just compensation and also unwittingly deprived Petitioner of its right to a trial by jury (*Dimick vs. Schiedt*, 293 U. S. 474, 79 L. Ed. 603, 55 Sup. Ct. 295). (Neither the Story Parchment Case nor the Eastman Kodak Case were mentioned by the Circuit Court in its opinion.)

21. The Circuit Court by its unduly technical construction of the pleadings and stipulation (actually not involved because Petitioner's evidence was received *without objection*, Rule 15, b, New Rules of Civil Procedure), has departed from the usual course of judicial proceedings and has failed to follow the usual liberality as to proof of damages in cases under the Sherman Act.

22. The Circuit Court of Appeals failed to mention in its opinion and to give effect to the case of *Cruikshank vs. St. Paul Fire & Marine*, 75 Minn. 266, 77 N. W. 958, and *Thomsen vs. Cayser*, 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353, from each of which cases it appears that if *upon any theory* Petitioner might have a cause of action, judgment should not be granted against it.

23. The decision of the Circuit Court completely overturns the holdings of this Court that where there is an *original wrong* and an *illegal exaction* "the law does not go be-

yond *the first step" (Southern Pacific vs. Darnell* and *Adams vs. Mills, supra).*

24. The decision, in effect, coddles violators of the Anti-Trust Law and hems them about with safeguards to which they are not entitled because of their violation of the Country's laws. *Local 167 vs. United States,* 291 U. S. 293, 78 L. Ed. 804, 54 Sup. Ct. 396. *Johnson vs. Schlitz Brewing Co.,* 33 Fed. Supp. 176.

25. The trial court was in doubt in directing a verdict (255). The doubt was *resolved in favor of the law violator.* This was wrong *(Local 167 vs. United States, supra).* The error was followed by the Circuit Court and that, too, was wrong.

26. This Court in *United States vs. Socony-Vacuum,* 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811, said that "There were buying programs of distress gasoline which had as their direct purpose and aim the raising and maintenance of spot market prices and of *prices to jobbers* and consumers in the Mid-western area." And the indictment in Madison Case No. 1 charged that the major companies "*arbitrarily exacted large sums of money from thousands of jobbers.*" There is *no decision of this Court* construing the Sherman Act as to civil cases arising out of the judgment of conviction in the Madison price fixing case.

27. The Circuit Court failed to give effect to the Minnesota Rule as to testimony received without objection as enunciated in *Hill vs. Northern Pac. Ry. Co.,* 297 N. W. 627.

28. Many civil suits by jobbers are pending and if proof that the illegal exaction under the conspiracy does not give rise to a cause of action and the cases of *Chattanooga Foundry vs. City of Atlanta, Thomsen vs. Cayser,* and *Straus vs. Victor Talking Machine Co., supra,* are not to be followed

litigants and the Bar should be so advised. And the Bar should be advised as to whether the rule of this Court in *Adams vs. Mills* and *So. Pac. vs. Darnell* is to be followed or whether those cases are superseded by the opinion of the Circuit Court herein.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PRECISE QUESTION NEVER DECIDED

The precise question as to recovery of civil damages by an oil jobber because of injury to its business and property growing out of the conspiracy for which defendant, with other major oil companies, was convicted (*United States vs. Socony-Vacuum Oil Company,* 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811) has never been decided by this Court.

The big general question may be divided into two parts:

1. Where a conspiracy or an illegal combination invades a free market and produces a wrongful price rise, takes an illegal exaction from a purchaser (particularly where the purchaser is tied to an *exclusive contract,* under which he has no voice as to purchase price), can the *purchaser* recover the *illegal exaction?*

2. Is it a *defense,* if proven, that the illegal exaction might have been or was "passed on to the retailer"? (254.)

These are the main questions involved in this appeal. *They have never been decided as to oil jobbers injured because of the conspiracy* for which the oil companies were convicted *in the Madison Cases.*

That oil jobbers sought the indictments of the major oil companies because they were being ruined is a matter of common knowledge. The indictment in the price-fixing case in Madison charged that the defendants "exacted large sums of money from thousands of jobbers" (37). Petitioner was *one* of such jobbers.

This Court has specifically held that for an *illegal exaction,* made possible because of a violation of the Sherman Law, there could be a recovery *(Chattanooga Foundry vs. Atlanta, supra).*

Here Petitioner, under its exclusive contract, bought

1,700,000 gallons of gasoline, was forced to pay 2¼ cents more per gallon for it because of the conspiracy and was damaged 1,700,000 x 2¼¢ on this branch of the case. Liability followed.

This Court has specifically held that "the law does not go beyond the first step," and the fact that the increase or illegal exaction might be "passed on to the retailer" (254) is *not* a defense. The cases will be referred to hereafter.

The Twin Ports Case was the first civil case tried wherein it was sought to recover damages in behalf of a jobber because of the conspiracy in *United States vs. Socony-Vacuum, supra.*

The jobber was tied down to an *exclusive* purchase contract. It had *nothing to say* about the *purchase price;* neither did it have anything to say about the price at which it *sold.* It did not seek, in this case, a recovery on a margin basis, so the retail price at Duluth was of no moment.

Important questions are here raised, also as to the construction of the Sherman Act and as to whether a *liberal* or *strict* rule exists as to damages in cases thereunder.

Also important are the questions as to *liberality* or *strictness* as to *pleading* under the New Rules of Civil Procedure for the United States District Courts.

The conspiracy as to margins as charged in the indictment in the jobber-contract case, commenced in 1931 (44, 51). The *effect* of this conspiracy, which had among other purposes that of *limiting and fixing margins,* was being felt by the jobbers from 1931 on. During the N. R. A. Code period the situation improved as to jobbers. The *Schecter Case,* 295 U. S. 495, 79 L. Ed. 1570, 55 Sup. Ct. 837, eliminated the Code. The Schecter Case was decided on May 27, 1935.

The Code was approved June 16, 1933. After the Code became operative and in 1934, the net profits of Petitioner

were $16,995.00 (141). In the year before, 1933, the net profits were only $1,519.00 (141).

As to just when the situation started to improve in 1933 under the Code the record is silent, but there was a big improvement so far as net earnings were concerned in 1934, when the net earnings were over $15,000.00 *more* than they were in 1933.

In 1935, *after the Code went out,* and in the *year of the buying programs* and the *conspiracy* made the basis of *this* action, instead of a net profit of $16,995.00, Petitioner suffered a *loss* of $1,348.00, a difference of $18,000.00.

The 1935 and 1936 illegal exactions and resulting losses occurred *after* the Code went out, when Petitioner could not get any better contract than the one it was operating under (150), and when Petitioner was tied up to the exclusive contract under which the evidence showed it could not live (150-151).

With the situation thus *becoming worse* the 1935 conspiracy came into being.

Petitioner kept up the losing struggle during 1935 and three months of 1936, hoping for the best. During all this time it paid the illegal exaction of 2¼¢ per gallon.

There was a gradual loss of profits every year from 1931 through 1933, covering the jobber-contract indictment period (140-141).

After the Code went into effect the situation improved over 1933. The 1934 net earnings were $16,995.00 (140). The so-called margins were out of the picture after the Code became inoperative and Petitioner handled gasoline on a sort of stop-loss basis, under which it received 5.5¢ per gallon for gasoline handled by it.

Here even under defendant's theory there was no chance for the margin situation to obtain. Defendant was consis-

tently billing plaintiff at a price 5.5¢ under the retail price in Duluth.

The uncontradicted evidence is that a jobber could not live on this basis (150-157). Petitioner was already in a bad position because of the jobber contract and margin conspiracy (44, 51, 52) when the price-fixing conspiracy hurled another volley into Petitioner's business.

With the buying programs working (36-37) Petitioner was given another push toward extinction.

Regardless of what stop-loss arrangement the contract provided, the fact remains that the undisputed evidence did show an illegal exaction of 2¼¢ per gallon. Had this illegal exaction not been taken from Petitioner, had the prices not been fixed, had they been where they would have been but for the conspiracy, the stop-loss provision of the contract would never have become operative. In any event it is immaterial—it deals with something subsequent to the original wrong—something of "no concern to the wrongdoer."

In that year, 1935, Petitioner lost $1,348.00 (141) and in only three months in 1936 it lost $2,375.00, or nearly twice as much as it had lost in the whole year of 1935. The rate of loss was alarming and was increasing rapidly.

Manifestly, Petitioner *could not continue in business at this rate.* The *two* conspiracies were too much.

Petitioner had two causes of action—one under the jobber margin indictment and judgment and one under the price-fixing indictment and judgment.

Petitioner originally sought damages because of both conspiracies.

Before the trial Petitioner *elected to base its claim for damages on the 1935 and 1936 conspiracy* only. This related to price-fixing (37-38). The indictment in the price-fixing case, Madison Case No. 1, *did not charge any agree-*

ments or restrictions as to margins; it charged *price-fixing* (37-38). The matter of margins was not in the indictment nor the case as it was tried. Margins and jobber contracts were involved in the other indictment (44, 51, 52, 55, 57, 61) under which no claim was made at the trial.

To the weakened jobber the 1935 conspiracy was the *final push,* the proverbial last straw. It resulted in putting it out of business. The jobber, Petitioner, elected to proceed on the price-fixing conspiracy only, making no proof as to the jobber margin conspiracy or the plea of *nolo contendere* thereunder.

Petitioner, relying upon the price-fixing conspiracy and the doctrine of *Chattanooga Foundry Co. vs. City of Atlanta,* 203 U. S. 390, 51 L. Ed. 241, 27 S. Ct. 65; *Straus vs. Victor Talking Machine Co.,* 297 Fed. 791, and *Thomsen vs. Cayser,* 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353, tried its case on the illegal exaction theory only.

The Circuit Court opinion says that Petitioner did not show what the prices *would have been* at Duluth, *but for* the illegal exaction, and hence could not recover.

This was not necessary on the theory upon which the case was tried and under *Chattanooga Foundry Co. vs. City of Atlanta, supra.* Further "the law does not go beyond the first step" *(Southern Pacific vs. Darnell, supra).*

If Petitioner had relied upon the margin theory in connection with the 1935 conspiracy and had sought recovery for loss of profits or margins from 1931 on, then, perhaps, it should have introduced evidence by an expert to show that had the illegal exaction not been made at Tulsa, and had the price Petitioner was compelled to pay been lower, the retail prices would still have remained where they were and Petitioner's profit or margin then would have been greater. But the margin question was not involved nor presented, nor were margins considered in the indictment in the price-

fixing case (36-37).

Petitioner chose the *simple, easy, direct method.* Petitioner *followed the rule laid down by this Honorable Court* that it could recover for the illegal exaction *(Chattanooga Foundry vs. City of Atlanta, supra).*

Petitioner did not believe that "pass on to the retailer" (254) *could possibly be a defense,* in view of the decisions of this Court in *Southern Pacific vs. Darnell* and *Adams vs. Mills, supra.*

The Circuit Court referred to statements by Secretary Friedman as to margins. Such statements made were immaterial and surplusage on the theory upon which the case was tried.

Conceding the fact that the jobbers were being injured by the conspiracy of 1931 and subsequent years as to uniform contracts, guaranteed margins, etc. (44, 51, 52), and conceding that Petitioner had been injured because of that conspiracy—all that *does not alter the fact that Petitioner was further injured* by the *buying programs,* exacting the illegal 2¼¢ per gallon from it (228-236).

What *would have happened* to the retail market in Duluth *but for* the illegal exaction, Petitioner did not show. *It did not have to.* As Justice Holmes said— "The law does not go beyond the first step." *Southern Pacific vs. Darnell, supra.*

Petitioner chose to show the illegal exaction under *Chattanooga vs. Atlanta, supra,* relying upon the *Adams vs. Mills,* and *Southern Pacific vs. Darnell,* cases as *eliminating* any such *defense* as "passed on to the retailer" (254).

STOP-LOSS PROVISION

The exclusive franchise contract contained a *stop-loss* provision. This provided that in no event would Petitioner's margin be less than 5.5¢ per gallon. Out of this Petitioner had to pay its resellers from 3¼ to 4 cents per gallon (171).

This stop-loss figure did not guarantee a profit nor provide a "living margin" (150-151). It is merely mentioned in passing, as it in no way affected or lessened the illegal exaction of 2¼ cents per gallon.

The Circuit Court overlooked the basic fact that Petitioner's claim was founded upon the illegal exaction. The contract provisions constituted no more of a defense than the "passed on to the retailer" idea did. The District Court directed a verdict on the "passed on to the retailer" theory (254) and *not* because of the stop-loss clause.

The liability accrued when the illegal exaction was made under the rule of *Chattanooga Foundry Co. vs. City of Atlanta, supra.* The stop-loss provision could only come into consideration *after* the illegal exaction of 2¼¢ had been made. This constituted no defense any more than "passed on to the retailer" constituted a defense, in view of the decisions in *Southern Pacific vs. Darnell* and *Adams vs. Mills, supra.*

This Court has directly held, in a case which has never been reversed or criticized, that a purchaser could recover damages because of an *excessive charge* made by reason of *a violation of the Sherman Act.* The following quotation is all sufficient:

> "Where a combination of sellers *caused prices* of certain piping to a city *to be raised, in violation of the Sherman Anti-Trust Law,* the City could *recover* the excess."
>
> *Chattanooga Foundry Co. vs. City of Atlanta, supra.*

To the same effect is the leading case of *Straus vs. Victor Talking Machine Company,* 297 Fed. 791. In that case the Court said:

> "In the case at bar, plaintiffs *have not sued* for damages due to *loss of profits.* Their position is that they were *entitled to buy goods in a free market;* that they were *prevented* from doing this by defendants' *illegal combination;* that they were *forced,* therefore, *to buy in the market which defendants had created,* and were thus compelled *to pay more* for their goods than the price which in that market was the fair and reasonable price. * * *"

The Court also said:

> "Whether, then, plaintiffs sold to their customers at a *profit* or *loss* becomes immaterial in this case. They were entitled to goods at the *reasonable price* thereof. Through no legal fault of theirs, but *because of defendants' wrong,* they were deprived of their *right,* and the jury could find that such deprivation defined in money was the difference between the established reasonable price and the amounts plaintiffs were *compelled to pay."*

The Straus case *was specifically referred to and approved by this Court* in the later case of *Story Parchment Company vs. Paterson Parchment Paper Company,* 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248, the *leading case in the United States on liberality as to proof of damages* under the Sherman Act.

The rule is definitely established by this Court that one who pays an *illegal exaction because of a conspiracy in violation of the Sherman Anti-Trust Law can recover the excess.* This is the specific holding of this Court in *Chattanooga Foundry Co. vs. City of Atlanta, supra.* (The Circuit Court did not mention this case in its opinion.)

LIBERAL RULE AS TO DAMAGES

The Circuit Court of Appeals in its opinion in the present case *did not even mention*, although the case was stressed in that Court and in the printed briefs, the case of *Story Parchment Company vs. Paterson Parchment Paper Company*, 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248, following the early case of *Eastman Kodak Company vs. Southern Photo Material Co.*, 273 U. S. 365, 71 L. Ed. 684, 47 S. Ct. 400. The Story Parchment Case is the *leading case* in the United States on the *liberal rule* of damages under the Sherman Act.

The opinion in the Story Parchment Company Case was by Mr. Justice Sutherland, who said:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages *with certainty*, it would be *a perversion of fundamental principles of justice* to deny all relief to the *injured* person, and thereby relieve the *wrongdoer* from making any *amend* for *his* acts. In such case, while the damages may not be determined by mere speculation or guess, *it will be enough* if the evidence show the extent of the damages as a matter of just and reasonable *inference, although the result be only approximate.* The *wrongdoer* is not entitled to *complain* that they cannot be measured with the *exactness* and *precision* that would be possible if the case, which he alone is responsible for making, were otherwise."

He also quoted with approval this language:

> "* * * the *facts* and *circumstances tending* to show the *probable* amount of such damages should be *submitted to the jury* to enable them *to form* * * * *such reasonable and probable estimate*, as in the exercise of good sense and sound judgment they shall think will produce adequate compensation."

The Circuit Court, as appears from the opinion, was attempting to *justify* the action of the trial judge in directing a verdict, saying: "We find that the record fully *supports* the statements of the trial court and its action in sustaining defendant's motion for a directed verdict" (342).

The Circuit Court proceeded upon a wrong idea. The question in the case was whether there was any evidence as to damages to be considered *by the jury.* Had there been a jury verdict, then the question might have been whether there was *support* for its verdict. It is not a question of *support* for the position of the trial court. The question is one of *support* for leaving the issue to the jury and the Circuit Court was wrong in holding that because the action was for "triple damages" (343), "necessary definiteness" was "immediately" suggested (343).

We invite a *comparison* of the language of the Circuit Court with the following language used by Mr. Justice Sutherland in the Story Parchment Case, *supra:*

> "The constant tendency of the courts is *to find some way in which damages can be awarded* where a *wrong* has been done. *Difficulty of ascertainment* is *no longer* confused with right of recovery."

REQUIRING TOO MUCH OF PLAINTIFF

In *Straus vs. Victor Talking Machine Co.,* 297 Fed. 791, it was said "that the Court *cautiously required plaintiffs to prove perhaps more than was necessary."* This has been surprisingly true of many *lower* courts. They have *required too much* of plaintiffs but *have been consistently reversed by the Supreme Court* in such cases as *Ramsay vs. Associated Billposters,* 260 U. S. 501, 67 L. Ed. 368, 43 Sup. Ct. 167.

They have *required too much* in the way of *pleading,* and have been reversed in such cases as *Stevens vs. Foster,* 61 S. Ct. 210, decided December 9, 1940.

See also as to no "technical nicety" as to pleading, *Holiday vs. Johnston,* decided May 26, 1941, 61 Sup. Ct. 1015.

The following quotation is from a case which had a stormy and unsuccessful career in all *lower* courts; Mr. Justice McReynolds, speaking for the Supreme Court, said:

> "The *fundamental purpose* of the Sherman Act was to secure equality of opportunity and to *protect* the public against evils commonly incident to *destruction of competition* through *monopolies* and *combinations in restraint of trade.* The alleged actions of defendants are *directly opposed* to this *beneficent purpose* and are *denounced* by the statute."
>
> *Charles A. Ramsay Co. vs. Associated Billposters, supra.*

In the Ramsay Cases, *supra,* after a long journey through the courts, it was finally held in *one* of the cases that *proof of damages* sufficiently appeared, for the jury, at least, where the plaintiff was "content to leave the matter on proof of earnings, expenses and net profits *before* the defendant's unlawful acts." In the other case (two cases being considered together), *estimates* as to damages were made. *Both* theories or methods of proof were objected to, but *both* were upheld. *Rankin vs. Associated Billposters,* 42 Fed. (2d) 152. This is the *same case* which appears as *Ramsay vs. Associated Billposters,* 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167.

Certiorari was denied in *Rankin vs. Associated Billposters,* 42 Fed. (2d) 152. See 282 U. S. 864, 75 L. Ed. 765.

It appearing, therefore, that under the existing law there can be no dispute as to the following:

(a) That where there *is* an illegal exaction because of a violation of the Sherman Act, there *can be* a recovery;

(b) That an exceptionally *liberal rule* as to damages applies in cases under the Sherman Act.

In directing the verdict in the court below the trial court used language which the *Circuit Court* of Appeals *omitted* in its opinion; although *quoting* language used by the trial court *from which the error of law was less plain.*

We quote what the trial court said in directing a verdict, this being the language which the Circuit Court of Appeals did *not* quote in its opinion:

> "It is *uncontradicted* in the evidence that the price of gasoline to the *jobber as a result of this conspiracy was increased*" (bottom p. 253).

The Circuit Court *did* quote language appearing at the bottom of page 254 and the top of page 255 containing the words, "Lessened margins," etc.

The trial court also said, but the Circuit Court did not quote it:

> "This has been a difficult case * * *. The Court may be *wrong.* * * * If I am *wrong,* there is of course another Court that *can correct this Court* and *set me right* in so far as the law is concerned" (255).

But the *doubt was resolved in favor of the wrongdoer* and *against* the *wronged,* contrary to *Local 167 vs. United States,* 291 U. S. 293, 78 L. Ed. 804, 54 S. Ct. 396, and *Story Parchment Company vs. Paterson Parchment Paper Co., supra.*

PASSED ON TO THE RETAILER

Is it a complete defense to say that the *illegal exaction* could be "passed on to the retailer"? (254.) The trial court said "Yes" (254). The Circuit Court said it was fully "*supported*" (342).

This Court should grant a writ to the end that that question might be determined. It has never been directly determined in a case involving the Sherman Act, but the rule

has been laid down under a like statute and that rule is *contrary* to the Circuit Court's opinion.

This Court, in an opinion by Mr. Justice Holmes, said:

> "The *only* question before us is that at which we have hinted; *whether the fact that the plaintiffs were able to pass on the damage* that they sustained in the *first instance* by paying the unreasonable charge, and to *collect* that amount *from the purchasers, prevents* their recovering the *overpayment* from the carriers. The answer is not difficult. *The general tendency of the law,* in regard to damages, at least, *is not to go beyond the first step.* As it does not attribute *remote* consequences to a *defendant,* so it holds him *liable* if *proximately* the plaintiff has suffered a *loss.* The *plaintiffs* suffered *losses* to the amount of the verdict *when they paid.* Their claim *accrued at once in the theory of the law,* and it does *not inquire into later events.*"
>
> *Southern Pacific vs. Darnell,* 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186.

In a later case the Court in an opinion by Mr. Justice Brandeis said:

> "The defendants contend that *even if* the exaction of the extra 25-cent charge *was unlawful,* the plaintiffs are not entitled to recover. The argument is that under Section 8 of the Interstate Commerce Act the liability of the common carrier is 'to the person or *persons injured thereby* for the *full amount of damages* sustained *in consequence of* any such violation'; that before any party can recover under the Act he must show *not merely the wrong* of the *carrier,* but that the *wrong has in fact operated to the plaintiff's injury;* that here the award is to the plaintiffs individually, not as agents for the shippers; and that individually they suffered no *pecuniary* loss, since they paid the charges as *commission merchants* and *reimbursed themselves* for these, as for other, charges from the *proceeds of the sale* of livestock, remitting to their principals only the *balance* remaining. We think the argument *unsound,* for the

reasons, among others, stated in *Southern P. Co. vs. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 62 L. Ed. 451."

Adams vs. Mills, 286 U. S. 397, 76 L. Ed. 1184.

In the Adams Case, Justice Brandeis further said:

"In contemplation of law the *claim for damages arose at the time the extra charge was paid.*"

He also said:

"Neither the fact of *subsequent reimbursement* by the plaintiffs from funds of the shippers, nor the disposition which may hereafter be made of the damages recovered, *is* of *any concern to the wrongdoers.*"

The *Adams vs. Mills* and the *Southern Pacific vs. Darnell* Cases have never been reversed and never departed from.

The Circuit Court of Appeals, to uphold its statement that "the record fully *supports* the statements of the trial court" —and be it remembered that the trial court said that because the increase was "passed on to the retailer" (254), there could be no recovery—took the position that the doctrine of the *Adams vs. Mills* and *Southern Pacific vs. Darnell* Cases did not apply because the Interstate Commerce Statute was *different* than the Sherman Act (342-343).

The Court also made the startling distinction that the damages in *Southern Pacific vs. Darnell* were "definitely and specifically *found by* the *commission* in its order" (343).

Had a *jury*, the tribunal to try *questions of fact* in this country, been permitted to pass upon the question, *it* undoubtedly would have "definitely and specifically *found*" some amount of damages. The degree of definiteness *does not vary with the tribunal finding the amount.*

The Circuit Court also said (speaking of *Adams vs. Mills*): "The unlawful charges paid are definite and *responsive to the provisions of the Act.*" Just what is meant by

the words italicized, we do not know, but we assume that any damages under the Sherman Act would be *"responsive* to the provisions of the Act," the *same* as under the Interstate Commerce Act.

But the Circuit Court goes further and makes the statement as to the Sherman Act: "This statute *differs materially* in its *provisions* from those of the Interstate Commerce Act, which *insure* definite and specific recoveries."

We are not so sure about the word, "insure." We touch on the question of definiteness and specific recoveries later, but now let us examine the statutes.

THE TWO STATUTES ARE SIMILAR

We quote the applicable provisions side by side below:

Interstate Commerce Act.	**Sherman Act.**
Liability in damages to persons injured by violation of law—	Suits by persons injured; amount of recovery—
In case any common carrier subject to the provisions of this chapter *shall do, cause to be done, or permit to be done any act*, matter or thing in this chapter *prohibited* or *declared* to be *unlawful*, or shall omit to do any act, matter or thing in this chapter required to be done, such common carrier *shall* be *liable* to the person or persons *injured* thereby for the *full amount* of *damages* sustained in consequence of any such violation of the provisions of this chapter, together with a *reasonable counsel* or *attorney's fee, to be fixed by the court* in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.	Any person who shall be *injured in his business or property* by reason of anything *forbidden* in the anti-trust laws may sue therefor in any district court of the United States * * * and shall recover *threefold* the *damages* by him sustained, and the cost of suit, including a *reasonable attorney's fee.*
Title 49, U. S. C. A., Sec. 8, Title 49, Sec. 8, *Mason's United States Code.*	Title 15, U. S. C. A., Sec. 7, Title 15, Sec. 15, *Mason's United States Code.*

A reading of the statutes answers the Circuit Court. Ar-

gument is hardly necessary. The Interstate Commerce Act allows recovery to the persons injured to the *full amount* of damages. The Sherman Act allows damages to a person injured "in his business or property," and instead of the *full amount* allows *threefold* damages.

If the right of action under the Interstate Commerce Act is *broader* and *greater* than under the Sherman Act, the Bar should be so told. If anything, recovery should be *broader* under the *Sherman Act.* A *conspiracy* is certainly *more heinous* than a *mere rate overcharge* or a rebate. There would be little logic in saying that under the *milder* Interstate Commerce Act, as stated by Mr. Justice Holmes, "the law does not go *beyond the first step,*" but that under the severe Sherman Act, where the recovery arises because of a *conspiracy to violate the laws of the United States,* damages must be shown with *greater definiteness* and *precision.* As an *original proposition* this would be wrong without any guiding decisions. But we have the Story Parchment Case, laying down a very liberal rule as to damages in Sherman Act Cases, not "the necessary definiteness" required by the Circuit Court.

The Circuit Court says that the fact that triple damages are sought "immediately suggests necessary definiteness in the basis of damages."

The Eastman Kodak Case and Story Parchment Case, *supra,* hold that definiteness and certainty are *not* required.

DARNELL RULE NOT BASED ON INTERSTATE COMMERCE ACT

The Circuit Court of Appeals held the Darnell Case inapplicable because it construed the Interstate Commerce Act —a statute "materially different" (?) from the Sherman Act.

Mr. Justice Holmes based the Darnell decision on the case of *Olds vs. Mapes-Reeve Construction Co.,* 177 Mass. 41-44, 58 N. E. 478. That was a case involving damages for an alleged breach of contract for putting up a building and had nothing to do with any so-called fixed losses, as held by the Circuit Court to be the case in actions under the Interstate Commerce Act.

In *Olliphant vs. Florida East Coast Car Ferry Co.,* 4 Fed. Supp. 288, the Court said:

> "The situation here is the same in principle as where an injured party recovers damages from a wrongdoer, as, for instance, for personal injuries, notwithstanding the injured party may be also indemnified by insurance. That the injured party is so indemnified is no concern of the wrongdoer, and no defense in an action for the tort."

RATE OF OVERCHARGE IN CASE NOT INVOLVING INTERSTATE COMMERCE ACT BUT SHERMAN ACT

A rate case—a shipping case under the Sherman Act (not the Interstate Commerce Act)—in which there *was* an *overcharge* and in which it was held that the *mere fact of the overcharge,* where there was *a conspiracy* to violate the Sherman Law, gave rise to a cause of action is *Thomsen vs. Cayser,* 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353.

In that case the Court said:

> "It is, however, contended that *even if* it be assumed the facts show an *illegal combination, they do not show injury* to the plaintiffs by reason thereof. The contention is *untenable.* Section 7 of the act gives a cause of action to any person *injured* in his person or property by reason of anything forbidden by the act, and the right to recover threefold the damages by him sustained. The plaintiffs alleged a *charge over a reasonable rate* and the *amount* of it. If the charge be *true* that *more than a reasonable rate was secured* by the

combination, the *excess* over what was reasonable *was an element of injury.*"

Thomsen vs. Cayser, supra.

The recovery for an *illegal rate exaction* was *allowed, not* under the Interstate Commerce Act, but under the Sherman Act.

The *basis* for the allowance, the illegal overcharge, due to the conspiracy, therefore, was *established* by Petitioner. That being so, does the *defense* of "passed on to the retailer" (254) allow defendant to escape? This Court has said *not.* (See *Southern Pacific vs. Darnell* and *Adams vs. Mills, supra.*)

In *Thomsen vs. Cayser* the Court also took the position, generally, that it appeared that *somehow, somewhere* plaintiff had a cause of action, that it *relied upon certain decisions* of the Court, which it had a right to do, and the Court refused to permit judgment to go in favor of the wrongdoer, Mr. Justice McKenna, saying: "It would be unjust to permit the plaintiff to go unshorn of justice."

Little need be said regarding the statement of the Circuit Court: "The *mere fact* that the existence of a *conspiracy* to raise prices is established is not sufficient *ipso facto,* to support a judgment for damages under the Sherman Act." *Petitioner did not claim it was.*

Petitioner showed the following:

(a) A substantial business running from $150,000.00 to over $300,000.00 a year from 1922 to 1936, when defendant "took" (143) Petitioner's property;

(b) Substantial gross profits during all of those years;

(c) Substantial net profits during practically all of those years except the period covered by the price fixing conspiracy;

(d) That Petitioner was forced out of business; that Re-

spondent "took" (143) its property valued at over $100,000.00 (149), giving it $45,000.00 therefor (159);

(e) That Petitioner received nothing for its good will, built up since 1922 (159);

(f) That Petitioner sold 1,700,000 gallons of gasoline and paid an illegal exaction, due to the conspiracy, of 2¼¢ per gallon for such gasoline;

(g) That Petitioner had a business from which the main stockholders, Friedman and Lubratovich, were drawing substantial salaries, all of which was lost (139).

All of the above *facts* were shown *without dispute* and amount to *more* than a *mere proof* that the Respondent had been *convicted* of a *conspiracy*. *Damages appeared* and were *clearly shown*.

Incidentally, it might be noticed that the Circuit Court mentioned "the *existence* of a conspiracy to raise prices." The conspiracy to raise prices not only "existed" but it was *carried into effect*.

> "In this case, the *result* was to place *a floor under the market*—a *floor* which served the function of increasing the stability and firmness of market prices."
>
> *United States vs. Socony-Vacuum*, 84 L. Ed. 1129, p. 1168, 310 U. S. 150, p. 223, 60 S. Ct. 811, p. 844.

> "Proof that a *combination was formed* for the purpose of *fixing prices* and that it *caused them to be fixed* or contributed to that result is proof of the *completion* of a price-fixing conspiracy under Section 1 of the Act. The indictment in this case charged that this combination had that purpose and effect. And there was *abundant evidence* to support it."
>
> *United States vs. Socony-Vacuum, supra.*

LOWER COURTS AT VARIANCE WITH SUPREME COURT

We invite a close study and scrutiny of the following table of cases under the Sherman Anti-Trust Law and the Interstate Commerce Act.

TABLE OF CASES

Title of Case	Decision of Lower Court	Decision of U. S. Sup. Court	Date
Ramsay vs. Associated Billposters, 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167	Judgment for Defendant Wrongdoer	Reversed	Jan. 2, 1923
U. S. vs. Socony-Vacuum Co., 60 S. Ct. 811, 310 U. S. 150, 84 L. Ed. 1129	Defendants let out in criminal case	Reversed	May 6, 1940
Southern Pac. R. R. vs. Darnell-Taenzer, 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451	(Interstate Commerce Act.) Judgment for Defendant Wrongdoer	Reversed	Jan. 21, 1918
Adams vs. Mills, 286 U. S. 397, 52 S. Ct. 589, 76 L. Ed. 1184	Judgment for Defendant Wrongdoer (Interstate Commerce Act)	Reversed	May 23, 1932
Stevens vs. Foster, 61 S. Ct. 210	Judgment for Defendant Wrongdoer	Reversed	Dec. 9, 1940
U. S. vs. Borden Milk Co., 60 S. Ct. 182, 308 U. S. 188, 84 L. Ed. 181	Judgment for Defendant Wrongdoer	Reversed	Dec. 4, 1939
Thomsen vs. Cayser, 243 U. S. 66, 61 L. Ed. 597, 37 Sup. Ct. 353	Judgment for Defendant Wrongdoer	Reversed	Mar. 6, 1917
Story Parchment vs. Paterson Parchment Co., 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544.	Judgment for Defendant Wrongdoer	Reversed	Feb. 24, 1931
Indiana Guide Pub. Co. vs. Prairie Farmer Pub. Co., 293 U. S. 268, 79 L. Ed. 356, 55 Sup. Ct. 182	Judgment for Defendant Wrongdoer	Reversed	Dec. 3, 1934

The cases above mentioned speak eloquently not only of the *trend* of the decisions but of the *positive adjudications*

that *wrongdoers* cannot escape the *penalty* for their *wrongs* under the Sherman Act any more than they can under the Federal Safety Appliance Act. (See *Texas & Pac. Ry. vs. Rigsby*, 36 S. Ct. 482, 241 U. S. 33, 60 L. Ed. 874.)

CIRCUIT COURT FAILED TO NOTICE CASES

Other than the case of *United States vs. Socony-Vacuum* in which the Respondent herein was convicted, the Circuit Court only mentioned *two* of the cases cited in the table —*Southern Pacific vs. Darnell*, and *Adams vs. Mills*, and utterly failed in attempting to show the rule of those cases to be inapplicable to the facts in the case at bar.

Nothing was said by the Circuit Court about the liberality in the matter of pleadings, as appears from *Stevens vs. Foster*, 61 S. Ct. 210 (see subsequent case of *Holiday vs. Johnston*, 61 Sup. Ct. 1015), nor the liberality as to damages in the Story Parchment Case and *Ramsay vs. Associated Billposters* nor the "rate" case under the Sherman Act—*Thomsen vs. Cayser*.

Nor was anything said about the tendency being *to find some way* in which to *award damages*. (Story Parchment Case.)

Nor was anything said about the liberality of the New Rules or treating the pleadings as amended to conform to the evidence (Rule 15c).

Neither was anything said about the Minnesota rule that where it appears that upon some theory plaintiff had a cause of action judgment should not be granted against it. This is the rule in *Cruikshank vs. St. Paul Fire & Marine Ins. Co.*, 75 Minn. 266, 77 N. W. 958. This case was called to the Court's attention with the suggestion that in view of the state rule there might be an applicability of the doctrine of *Erie Ry. vs. Tomkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817.

PLEADINGS, STIPULATION, MARGIN

Originally *two* judgments were involved as a basis for recovery in this civil action. One was the judgment in the so-called *Jobber contract case,* which is referred to as Madison Case No. 2. The indictment in that case is found at page 44 of the record and charges a conspiracy "to regulate, and to fix and make uniform the amounts of guaranteed margins to be allowed to jobbers" (44, 51-52).

The other indictment, the one under which the case was tried, involved price-fixing only (25, 36-37).

By stipulation and pleadings the parties simply agreed to *eliminate the margin case* and try the case on the *price-fixing* conviction. The complaint was sufficiently broad to permit this.

The *purpose* of the stipulation was *to eliminate Madison Case No. 2,* the Jobber contract case, or margin case, from consideration, *not* to *hamper* Petitioner in its proof as to Madison Case No. 1.

The Stipulation provided:

> "Plaintiff may offer evidence that the *conspiracy* as to which the judgment is *prima facie* evidence, *proximately injured plaintiff*" (paragraph 4, page 86 of the record).

Clearly under the liberality permitted by the New Rules this did not limit plaintiff to "margins." While the term, "margin," was used in the Stipulation, the complaint was broad enough to allow proof of the illegal exaction (70-71, 72, 73), which was the intention of the parties.

NO OBJECTION AS BEYOND STIPULATION

The parties specifically reserved, by paragraph 7 of the Stipulation (88), *the right to make any objection* as to any *offer* or *proof* of *evidence*. It was provided that the Stipulation "shall not be construed as a *waiver* by any party of any *objection* to the admissibility of any proof or matter as evidence" (88).

Defendant *might have objected*, although we do not think the objection would have been proper, to the evidence as to the effect of the "floor" and the *effect* of the *price fixing and buying programs*, as testified to by John Cox (228-236).

Defendant *might have* said that that testimony was inadmissible, as *beyond the terms of the Stipulation. It did not do so* (112, 113, 114, 228-236).

A TECHNICAL STRAW

The defense that the Stipulation, in effect, eliminated *all* the allegations of the complaint (70-71) (76-77) is a sort of grasping at a highly technical straw in an attempt by defendant to save itself from the effect of the judgment in Madison Case No. 1, which "*proximately injured* plaintiff" (quotation from paragraph 4 of Stipulation, p. 86) and to get away from the fact "that there was a *causal connection between such conspiracy and the damages claimed to have been sustained by plaintiff*" (quotation from paragraph 4 of the Stipulation, page 86 of the record).

AMENDMENT OF PLEADINGS

Paragraph 22 of the *original* complaint contained an allegation that the prices did *not* rise at Duluth proportionately with the rise at Tulsa. The *new* paragraph 22 *eliminated* this word, "proportionately," and charged (72-73) "that the

basic price of gasoline, f. o. b. Group III, was so *fixed* by defendants and by reason of the conspiracy" "*that plaintiff was damaged in the sum of approximately two cents (2¢) per gallon for each gallon* of gasoline," etc. (72-73). Certainly this was sufficient to show the illegal exaction, especially under the New Rules as to Pleadings. That Respondent *thought so* is evident from the fact that *no objection was made* to the testimony of John Cox (228-236) nor to the final judgment of conviction (112, 113, 114, 228-236). (See as to Respondent's idea *Holiday vs. Johnston*, 61 Sup. Ct. 1015, in view of fact no objection was made to plaintiff's proof (228, 236).)

It was plaintiff's idea that there was still some marginal injury, in the most technical and strict sense, because the rise at Duluth and Tulsa were not always timed the same (145, 207). But plaintiff did not try the case on that theory.

Paragraph 16 of the complaint made a *direct charge* of an *increase* and *fixing* of tank car prices (71).

To justify its position that this was *wholly* a margin case, the Circuit Court quoted a colloquy between the trial court and counsel, relative to the amendment of the complaint, but *did not quote* that portion of the colloquy *favorable* to the Petitioner:

> "Mr. Michel: That is *one* thing, yes.
>
> The Court: And what is the *other* claim?
>
> Mr. Michel: That they were stabilized—that they *stayed there*—stayed *too high—should have been lower.*"
>
> The Court asked: "If the margins were stabilized, how were you damaged?" And then this occurred:
>
> "Mr. Michel: Because they should have been *lower. We could not buy in the kind of a market that we should have been.* (Citing cases.) We say there was damage in *both* ways—they *fixed them and they raised them.* That is our claim, your Honor, and that has been the way it has been all the way through—that they raised

and fixed them. You will find that here in other allegations" (105).

Then the following occurred, and it was *not* quoted in the opinion:

"The Court: Well, do you contend that you can show some *causal relationship* between the *stabilization of prices and damage to your business?*

Mr. Michel: *Yes, we do,* and that is what we want to do here. That is the purpose of this amendment. We feel we should be entitled to do that under the circumstances.

The Court: In other words, you contend that *both elements* are to be considered in so far as damage is concerned?

Mr. Michel: Yes" (106).

We particularly call attention to the word, "*both*," used on page 106. And all this the Circuit Court does not quote but *does* quote some more restrictive language.

While it is true the word, "margins," again crept into the case it is clear that both elements (106) were to be considered.

Further, *the colloquy is not the pleading.* It may have been a *reason* for the *amendment,* but it is *not the pleading.* And the amendment was not necessary. Paragraph 16 of the complaint (70-71) was amply broad and sufficient to permit evidence that defendant sold Petitioner at artificially fixed prices. Further, the evidence was received without objection (228-236).

At folio 105 the words "(citing cases)" appear. *Straus vs. Victor Talking Machine Co.,* 297 Fed. 791; *Chattanooga Foundry Co. vs. City of Atlanta,* 203 U. S. 390, 51 L. Ed. 241, 27 S. Ct. 65, and *Thomsen vs. Cayser,* 243 U. S. 66, 61 L. Ed. 597, 37 Sup. Ct. 353, were relied upon below. These are the "citing cases." This was the reliance of Petitioner.

The claim, then, was not "margin," but being forced to buy in a closed market, created and held by the conspiracy.

NO OBJECTION AS TO PLEADINGS OR STIPULATION

The *pleadings* control in the *first instance*. Secondly, *regardless of pleadings*, the *evidence* was received *without objection*.

> "When issues *not raised by the pleadings* are tried by express or *implied consent* of the parties *they shall be treated in all respects as if they had been raised in the pleadings.*"
>
> Rule 15, Sub-division (b), Rules of Civil Procedure for the District Courts of the United States.

Pleadings are not to be so *technically* construed as to defeat a plaintiff's right to a trial by jury, where defendant has been adjudged guilty of a conspiracy to violate the laws of the United States. See Rule 8, Sub-division (e), Section 1, Rules of Civil Procedure for the District Courts of the United States.

> "All pleadings shall be so construed as to do substantial justice." *Ibid.*, Sec. f.
>
> (See *Holiday vs. Johnston*, 61 Sup. Ct. 1015.)

CONCLUSION

The questions here presented are too important to be left unsolved or to be "solved erroneously," as was done by the Circuit Court.

The opinion of the lower court stands out as, and it is, *wholly inconsistent with practically everything this Court has decided in civil actions under the Sherman Act*, and it certainly is *inconsistent* with and makes a most weak distinction of the cases of *Southern Pacific vs. Darnell* and *Adams vs. Mills, supra.*

On the mere face of this Petition for Certiorari, plus a reading of the opinion of the Circuit Court, enough appears for a reversal.

Certainly ample grounds appear for a hearing on the important questions involved, which this Honorable Court has not heretofore directly passed upon.

The decision of the Circuit Court would not be correct if it dealt with original propositions.

It is wrong because in conflict with many decisions of this Court on like questions.

The precise questions, as pertaining to the Sherman Act and the Madison conviction should be determined by this Court, that the error of the Circuit Court be corrected.

Respectfully submitted,

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 227

TWIN PORTS OIL COMPANY, A CORPORATION,
Petitioner,

vs.

THE PURE OIL COMPANY, A CORPORATION,
Respondent.

BRIEF OF THE PURE OIL COMPANY, RESPONDENT, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF THE PURE OIL COMPANY, RESPONDENT, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The opinion of the Circuit Court of Appeals appears on pages 334 to 344 of the record and is reported in 119 F. (2d) 747.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 20, 1941. The jurisdiction of this Court is invoked on the ground that the case is based upon an alleged violation of the Sherman and Clayton Anti-Trust Acts. Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. § 1; Act of October 15, 1914, 38 Stat. 730, 15 U. S. C. A. § 15. (Petitioner's petition for writ of certiorari, p. 4.)

STATEMENT OF THE CASE.

This is an action for treble damages by Twin Ports Oil Company, petitioner, against The Pure Oil Company, respondent, under the Sherman and Clayton Anti-Trust Acts, and is based on the government prosecution of various oil companies in the so-called *Madison Oil Case No. 1, United States* v. *Socony-Vacuum Oil Company, Inc., et al.*, 310 U. S. 150.

It was alleged in the indictment in such case that from February 1935 to December 1936, certain oil companies, including respondent, conspired to engage in concerted buying programs for the purpose of increasing the tank car spot price and, in turn, the retail price of gasoline in the Mid-Western area. (R. pp. 25-42.)

Twin Ports Oil Company alleged that it was a jobber in Duluth, Minnesota, purchasing gasoline in tank car quantities and selling to consumers and dealers; that the increase in the tank car spot price as the result of the buying programs could not be passed on by it to the public; that its margins (difference between purchasing and selling prices) received on sales of gasoline were lessened and it was thereby damaged. (R. pp. 72-6.)

The trial judge, Honorable Gunnar H. Nordbye, held that although there was evidence of an increase in the price of gasoline to the jobber, Twin Ports Oil Company, the undisputed proof showed there was a corresponding increase in the retail price. The court concluded that there was a failure of proof to show a lessening of margins and accordingly instructed the jury to return a verdict for respondent at the conclusion of petitioner's case. (R. pp. 252-6.)

The Circuit Court of Appeals held that the record fully

supported the action of the trial court in sustaining respondent's motion for a directed verdict and that there was a failure to show lessened margins and damages to petitioner as a result of the illegal combination charged. (R. p. 342.)

It is urged in the petition for writ of certiorari that Twin Ports Oil Company is entitled to recover any increase in price to it as the result of the alleged conspiracy, regardless of the fact that its margins were not affected. This same contention was made in the Circuit Court of Appeals, and the court found that under the pleadings, a stipulation limiting the issues on the trial and proceedings in the lower court, the theory of damages asserted by petitioner was a lessening of margins. (R. pp. 335-342.)

SUMMARY OF ARGUMENT.

I.

The Circuit Court of Appeals was correct in affirming the judgment of the trial court and in finding that there was no evidence that the margins received by petitioner on gasoline sold by it were lessened as a result of the alleged conspiracy.

In order to maintain an action under the Clayton Anti-Trust Act for treble damages, a party must prove injury in its business or property as a proximate result of a violation of the anti-trust laws.

Clayton Act, Act of Oct. 15, 1914, 38 Stat. 730, 15 U. S. C. A. § 15.

Glenn Coal Co. v. *Dickinson Fuel Co.*, 72 F. (2d) 885, 887.

Jack v. *Armour & Co.*, 291 F. 741, 745.

A stipulation limiting the issues on the trial, the pleadings and proceedings in the trial court establish that the theory of damages asserted by petitioner was lessened margins.

The undisputed evidence established, as conceded by petitioner, that the margins received by it on sales of gasoline were not lessened as a result of the alleged conspiracy.

II.

There is a clear distinction between the certainty of proof necessary to establish the fact and the cause of injury, and the certainty of proof necessary to enable a jury to fix the amount of damages.

Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562.

Palmer, et al. v. *Connecticut Railway & Lighting Co.*, 311 U. S. 544, 561.

ARGUMENT.

I.

The Circuit Court of Appeals was correct in affirming the judgment of the trial court and in finding that there was no evidence that the margins received by petitioner on gasoline sold by it were lessened as a result of the alleged conspiracy.

In order to maintain an action under the Clayton Anti-Trust Act for treble damages, a party must prove *injury* in its "business or property" as a proximate result of a violation of the anti-trust laws. 15 U. S. C. A. § 15; *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. (2d) 885, 887; *Jack* v. *Armour & Co.*, 291 F. 741, 745.

The theory of injury asserted in this case was that the margins received by Twin Ports Oil Company on gasoline sold by it had been lessened as the result of a conspiracy to raise the tank car spot market and, also, that it was thereby forced to sell its business. The evidence established that prior to and during the period of the alleged conspiracy, Twin Ports Oil Company received a margin of 5½¢ per gallon on its sales of gasoline. (Appendix.) This margin did not change from December 3, 1934 to the date of the sale of the Twin Ports' properties to The Pure Oil Company on March 31, 1936. (Appendix.)

Under the supply contract of Twin Ports Oil Company with The Pure Oil Company, it was provided that the price of Purol-Pep gasoline (regular) should be the average spot market price determined by taking the average of the prices for like materials published daily in Platt's Oilgram, Tulsa edition, and the Chicago Journal of Com-

merce. (R. p. 265.) The contract further provided that if the spot market price plus freight gave to buyer a margin of less than 5¢ per gallon below the posted service station price of Standard Oil Company (Indiana) at Duluth, the seller would bill buyer for such gasoline at 5¢ below Standard's service station price. This is called the "guaranteed margin" because, under no circumstances, could the margin or spread between the purchase price of Twin Ports and Standard's service station price at Duluth be less than 5¢. This guaranteed margin was voluntarily increased by Pure after the execution of the contract. (R. pp. 207-8, 285, 290.) From September 11, 1934 to December 3, 1934, Pure allowed Twin Ports a 6¢ guaranteed margin, and from December 3, 1934 to the date of the sale, March 31, 1936, Pure gave Twin Ports a 5½¢ guaranteed margin. (Appendix.) Thus, the guaranteed margin provision of the contract was operative after September 11, 1934. From the beginning of the alleged conspiracy in February 1935 to the date of the sale of the properties on March 31, 1936, the price of gasoline to Twin Ports was determined by deducting 5½¢ from Standard's Duluth service station price. (Appendix.) Therefore, the price was increased to Twin Ports only when there was a corresponding increase in Standard's service station price, which was the price followed by Twin Ports in its sales to dealers and consumers. (R. pp. 110, 208.) Thus, the margins of Twin Ports were not lessened. The Circuit Court of Appeals said:

> "It is evident from the argument of appellant's counsel in their brief that they found it impossible to show that an increase in the price of gasoline to appellant was not immediately reflected in a corresponding increase in the retailer's price during the years in question. Therefore, there was no loss in margin, nor in the sale of appellant's property that could be attributed to this so-called buying program." (R. p. 342.)

In petitioner's brief in the Circuit Court of Appeals it is admitted that the margins were 5½¢ during 1935 and 1936 and that "they did not lessen during the conspiracy years." (Appellant's Brief in C. C. A., p. 28.)

Petitioner urged in the Court of Appeals and also contends in its petition for writ of certiorari that this case was not tried on the margin theory, but on the theory that petitioner is entitled to recover any increase in price to it though the retail price may also have been increased. This contention is contrary to a stipulation of the parties, petitioner's pleadings and the proceedings in the trial court.

The parties entered into a stipulation, dated August 22, 1940, to limit the issues on the trial (R. pp. 76-88), and, as found by the Circuit Court of Appeals, such stipulation was presented to the trial court at a pre-trial hearing. (R. p. 102.) In paragraph 5 of the stipulation, it is provided that the claim of damages shall be based on lessening of margins and, in paragraph 6, the term "margins" is defined. (R. pp. 87-88.) On the day the case went to trial, petitioner offered a trial amendment, which is paragraph 22 of the amended amended complaint. (R. pp. 102, 107.) At such time a colloquy took place between the parties and the court, and is quoted in the opinion of the Circuit Court of Appeals as follows:

> "Mr. Searls (for defendant): Isn't it true that you claim your injury relates to margins in this case?
>
> Mr. Michel (for plaintiff): Yes, it relates to margins.
>
> Mr. Searls: And you have defined 'margin' in the stipulation?
>
> Mr. Michel: Yes.
>
> Mr. Searls: And that is a definition that you put into the stipulation?
>
> Mr. Michel: Yes, and the margin would have been different but for the conspiracy.
>
> Mr. Searls: In other words you claim your injury relates to margin as defined in the stipulation?

Mr. Michel: Yes. We want to show—we want this broad enough—that if it had not been for the conspiracy our margin would have been greater, and we think under the very liberal interpretation of the new rules, we should be permitted to do this.

The Court: Well, how are you going to be prejudiced by the amendment as offered, Mr. Searls?

Mr. Searls: If the Court please, I do not raise any question about notice. I was given notice two weeks ago. The only question I raise is that it does not seem to me it is proper for the plaintiff to amend his complaint after signing this stipulation.

The Court: Of course I think, Mr. Michel, that according to the stipulation, you have indicated that your damages are solely to be found in the lessening of your margins, and the consequent injury upon your business.

Mr. Michel: Yes, and we want to show how they were lessened.

The Court: Then you do not depart from that theory of damages? In other words, that the immediate result of this conspiracy was a lessening of your margins?

Mr. Michel: Yes, that is our theory.

The Court: But you contend that even though there was a reflected increase in the retailers' price, that the stabilization of price and the fixing of price in some way affected your margins—is that right?

Mr. Michel: Yes, that is our point.

The Court: And you are following along the same theory with reference to damage, in that it refers exclusively to the lessening of margins?

Mr. Michel: Yes.

The Court: Well, if that is his position, I think I will allow the amendment." (R. pp. 106-7.)

"Lessened margins" is the theory of damages asserted in this trial amendment to the complaint, which provides in part as follows:

"* * * that the increase in the basic prices for tank car gasoline were not and could not be passed on to the public because of plaintiff's contractual relations

with the defendant, Pure Oil Company, and with its retailers * * *; that the basic price of gasoline, F.O.B. Group III, was so fixed by defendants and by reason of the conspiracy herein that the margin which plaintiff would have received for the sale of gasoline sold by it during the periods herein set forth was lessened in the sum of approximately two (2¢) cents per gallon for every gallon of gasoline sold by plaintiff and that plaintiff was damaged in the sum of approximately two (2¢) cents per gallon for each gallon of gasoline so sold by it by reason of said conspiracy." (R. pp. 72-3.)

In paragraphs 12, 23 and 24 of the complaint petitioner alleges a lessening of margins. (R. pp. 69, 73.) In paragraph 36 petitioner sets out the amount of its gallonage for 1935 and 1936, the amount of damage per gallon as the result of narrowed margins and the total amount of such damage. (R. p. 76.)

During the trial of the case petitioner's counsel stated in a colloquy with the Court that the claim of damages was based on lessened margins. (R. p. 198.)

The record is replete with testimony on the question of margins. (R. pp. 155, 156, 157, 197, 198, 200 and 206.)

The court permitted the witness Friedman to testify on direct examination over respondent's objection as to why Twin Ports Oil Company went out of business:

"Q. Tell the jury why you went out of business.

A. Because we could not operate on the present margins; they were too low." (R. p. 158.)

Petitioner asserts that it is entitled to recover any increase in price to it because the witness Cox was permitted to testify without objection that the spot market was increased as a result of the alleged conspiracy. (Petitioner's petition and brief, pp. 15, 46.) Petitioner relies on Rule 15(b) of the Federal Rules of Civil Procedure, which provides that "when issues not raised by the plead-

ings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in pleadings." The testimony of the witness Cox did not indicate any change in the theory of damages, as it was necessary to prove an increase in the tank car price under the margin theory of damages. This fact is shown by the trial amendment to the complaint, in which it is alleged that "due to said conspiracy * * * the tank car prices of gasoline were caused to be and were increased by defendants at said basic price area; * * * that the increase in the basic prices for tank car gasoline were not and could not be passed on to the public * * *." (R. p. 72.) Moreover, in view of the stipulation of the parties limiting the claim of damages to the margin theory and the proceedings in the trial court, it can not be said that respondent impliedly consented to any change in this theory.

The opinion expressed by the witness Cox that the tank car market would have been 2¼¢ lower in the absence of the alleged buying programs does not establish any fact issue of lessened margins to Twin Ports as a jobber, because there was no testimony as to what the service station price at Duluth would have been in the absence of the alleged buying programs. The margins of a jobber are determined by both the tank car price (wholesale) and service station price (retail), and testimony as to both prices under the same circumstances is essential to establish the margin to be received by a jobber at any given time.

The Circuit Court of Appeals held that "evidence in regard to both spot market price and service station price was necessary to determine the amount of the margins involved" and that petitioner offered no "evidence of what the service station price might or would have been in the absence of the buying programs." Petitioner concedes in its brief in this Court that testimony in regard to the service station price, as well as the spot market

price, would be necessary in establishing a claim of damages under the margin theory and that no evidence was offered as to the service station price. (Petitioner's Brief, p. 24.)

There was not only a failure of proof to show that the margins would have been any larger in the absence of the buying programs, but also the proof negatives such fact as it appears that the service station price was based on the spot market. The retail price at Duluth followed the spot market price up and down immediately preceding the alleged conspiracy, and it followed such price very closely during the period of the conspiracy. (Exhibit X, R. pp. 246, 260; Exhibit W, R. pp. 221, 261; and Exhibit Z, R. pp. 250, 256-260.) An analysis of these prices discloses that there was a definite relationship between the tank car spot market and the retail price after September 11, 1934. It was charged in the indictment in *United States* v. *Socony-Vacuum Oil Company, Inc., et al.*, 310 U. S. 150, that "spot market tank car prices of gasoline tend to, and do, directly and substantially influence the retail prices of gasoline." (R. p. 36.) The Supreme Court in that case discussed this relationship between the spot market and the retail prices in the Mid-Western area and said (p. 200):

> "In sum, the contours of the retail prices conformed in general to those of the tank car spot markets. The movements of the two were not just somewhat comparable; they were strikingly similar."

The Duluth service station price followed the spot market even closer than the average retail prices in the Mid-Western area as referred to in the above opinion. However, in the present case, Pure's billing prices to Twin Ports followed the Duluth service station price exactly, as they were based on such price during the period of the alleged conspiracy. This fact prevented any lessening of margins.

II.

There is a clear distinction between the certainty of proof necessary to establish the fact and the cause of injury, and the certainty of proof necessary to enable a jury to fix the amount of damages.

Petitioner asserts that the Circuit Court of Appeals failed to give effect to the liberal rule of damages followed by the courts in anti-trust cases and petitioner cites *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, and *Eastman Company* v. *Southern Photo Materials Co.*, 273 U. S. 359. In both of those cases it was established that the plaintiff had sustained an injury and damage as a result of illegal acts and the only uncertainty was the amount of the damage. Petitioner fails to recognize the distinction which the courts make between the certainty of proof required to show the cause and fact of injury or damage and the certainty of proof required to establish the amount of damages. In the *Story Parchment Co.* case, the Supreme Court said (282 U. S. 562):

> "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

In the recent decision of the Supreme Court of the United States in *Palmer, et al.* v. *Connecticut Railway & Lighting Co.*, 311 U. S. 544, 561 (1941), Mr. Justice Reed said:

> "*Certainty in the fact of damage is essential.* Certainty as to the amount goes no further than to require a basis for a reasoned conclusion." (Italics ours.)

We are not concerned here with the certainty of proof to establish the amount of damage, because there is no evi-

dence that petitioner sustained any injury or that the alleged conspiracy was the cause of any claimed injury.

Petitioner has set out in its brief in this Court a statement of its annual gross business during the period 1922 to 1936 and has also referred to its earnings (petition and brief, pp. 5, 22, 23), but this does not raise a fact issue of injury as a result of the alleged buying programs. The history of petitioner's business discloses that in some years it made a profit and in others it sustained a loss. In several months of 1933 petitioner received a guaranteed margin of 5¢ per gallon on gasoline sold by it, which was less than the margin received in 1935 and 1936. On September 11, 1934, there was a cut in the service station price of Standard of Indiana in the amount of 1.9¢ (R. p. 261) and this had the effect of reducing the margins of all jobbers, including Twin Ports, who elected to follow Standard's service station price. As a result of this reduction in the service station price, Pure began giving Twin Ports a guaranteed margin by reducing its billing price to Twin Ports 0.6¢ per gallon and thereby Pure sustained part of this loss. (R. p. 284.) The margin of Twin Ports was actually reduced 1.3¢ per gallon as the result of the reduction in the service station price (R. pp. 261, 284) and, of course, this affected subsequent earnings of Twin Ports.

Certainly there is no connection between this reduction in the service station price on September 11, 1934, and the buying programs of 1935 and 1936 which Twin Ports alleges had the effect of increasing and not reducing prices. Morover, both the government and petitioner claim that the conspiracy in regard to the buying programs began in February, 1935. Obviously, there is no causal connection between the buying programs and this cut in the service station price on September 11, 1934, and, furthermore, petitioner does not claim that there is any causal connection. The proof of petitioner does not meet the requirement of certainty in the fact and cause of damage.

Conclusion.

An action for treble damages for violation of the anti-trust laws is based on section 4 of the Clayton Act, which gives a right of action to a person "who shall be injured in his business or property". Petitioner's claim of injury in its business or property was lessened margins and a forced sale of its properties by reason thereof. The undisputed evidence, as conceded by petitioner, establishes that its margins were not lessened. Thus, it sustained no injury in its business or property as required by the statute. The attempt of petitioner to change its theory and recover any increase in the price of gasoline is inconsistent with the stipulation of the parties and the proceedings in the trial court.

WHEREFORE the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

TWIN PORTS OIL COMPANY'S MARGIN
September 11, 1934 to March 31, 1936, Inc.
REGULAR GRADE GASOLINE

Date Ordered		Pure's Billing Price	Pure's Billing Price Plus Freight	SO (Ind.) Service Station Price at Duluth less Inspec. Fees & Taxes (*)		Margin Between Service Station Price & Pure's Billing Price Plus Freight
1934						
Sept.	13	4.158¢	7.26¢	(9-11)	13.26¢	6.00¢
	17	4.158	7.26		13.26	6.00
	18	4.158	7.26		13.26	6.00
	19	4.158	7.26		13.26	6.00
	21	4.158	7.26		13.26	6.00
	24	4.158	7.26		13.26	6.00
	25	4.158	7.26		13.26	6.00
	27	4.158	7.26		13.26	6.00
	28	4.158	7.26		13.26	6.00
Oct.	1	4.158	7.26		13.26	6.00
	3	4.158	7.26		13.26	6.00
	4	4.158	7.26		13.26	6.00
	5	4.158	7.26		13.26	6.00
	9	4.158	7.26		13.26	6.00
	10	4.158	7.26		13.26	6.00
	11	4.158	7.26		13.26	6.00
	12	4.158	7.26		13.26	6.00
	16	4.158	7.26		13.26	6.00
	18	4.158	7.26		13.26	6.00
	18	3.858	6.96	(10-20)	12.96	6.00
	22	3.858	6.96		12.96	6.00
	23	3.858	6.96		12.96	6.00
	24	3.858	6.96		12.96	6.00
	26	3.858	6.96		12.96	6.00
	29	3.858	6.96		12.96	6.00
	30	3.858	6.96		12.96	6.00
Nov.	1	3.858	6.96		12.96	6.00
	2	3.858	6.96		12.96	6.00
	5	3.858	6.96		12.96	6.00
	6	3.858	6.96		12.96	6.00
	7	3.858	6.96		12.96	6.00
	9	3.858	6.96		12.96	6.00
	12	3.858	6.96		12.96	6.00
	9	3.858	6.96		12.96	6.00
	12	3.858	6.96		12.96	6.00
	12	3.858	6.96		12.96	6.00
	13	4.158	7.26	(11-13)	13.26	6.00
	15	4.158	7.26		13.26	6.00
	20	4.158	7.26		13.26	6.00
	24	4.158	7.26		13.26	6.00
	30	4.158	7.26		13.26	6.00

* Date shown in brackets is date service station price was changed.
NOTE: Billing price was usually determined as of date of order.
All prices represent cents per gallon.

Date Ordered		Pure's Billing Price	Pure's Billing Price Plus Freight	SO (Ind.) Service Station Price at Duluth less Inspec. Fees & Taxes (*)		Margin Between Service Station Price & Pure's Billing Price Plus Freight
1934						
Dec.	3	4.658	7.76		13.26	5.50
	4	4.658	7.76		13.26	5.50
	10	4.658	7.76		13.26	5.50
	12	4.658	7.76		13.26	5.50
	15	4.658	7.76		13.26	5.50
	19	4.658	7.76		13.26	5.50
	21	4.658	7.76		13.26	5.50
	24	4.658	7.76		13.26	5.50
	27	4.658	7.76		13.26	5.50
	31	4.658	7.76		13.26	5.50
1935						
Jan.	2	4.658	7.76		13.26	5.50
	4	4.658	7.76		13.26	5.50
	7	4.658	7.76		13.26	5.50
	10	4.658	7.76		13.26	5.50
	14	4.658	7.76		13.26	5.50
	17	4.658	7.76		13.26	5.50
	21	4.658	7.76		13.26	5.50
	24	4.658	7.76		13.26	5.50
	25	4.658	7.76		13.26	5.50
	28	4.658	7.76		13.26	5.50
	31	4.658	7.76		13.26	5.50
Feb.	2	4.625	7.727		13.26	5.53
	6	4.358	7.46	(2-2)	12.96	5.50
	7	4.358	7.46		12.96	5.50
	12	4.358	7.46		12.96	5.50
	14	4.358	7.46		12.96	5.50
	16	4.358	7.46		12.96	5.50
	20	4.358	7.46		12.96	5.50
	21	4.358	7.46		12.96	5.50
	25	4.358	7.46		12.96	5.50
Mar.	1	4.358	7.46		12.96	5.50
	2	4.358	7.46		12.96	5.50
	6	4.358	7.46		12.96	5.50
	7	4.358	7.46		12.96	5.50
	11	4.358	7.46		12.96	5.50
	14	4.358	7.46		12.96	5.50
	15	4.358	7.46		12.96	5.50
	19	4.358	7.46		12.96	5.50
	21	4.358	7.46		12.96	5.50
	26	4.658	7.76	(3-22)	13.26	5.50
	27	4.658	7.76		13.26	5.50
	29	4.658	7.76		13.26	5.50
Apr.	2	4.658	7.76		13.26	5.50
	3	4.658	7.76		13.26	5.50
	5	4.658	7.76		13.26	5.50
	8	4.658	7.76		13.26	5.50
	11	4.658	7.76		13.26	5.50
	11	4.658	7.76		13.26	5.50
	15	4.958	8.06	(4-12)	13.56	5.50
	17	4.992	8.16	(4-18)	13.66	5.50
	19	4.992	8.16		13.66	5.50
	23	4.992	8.16		13.66	5.50
	25	4.992	8.16		13.66	5.50
	26	4.992	8.16		13.66	5.50
	30	4.992	8.16		13.66	5.50

* Date shown in brackets is date service station price was changed.

NOTE: Billing price was usually determined as of date of order. All prices represent cents per gallon.

Date Ordered		Pure's Billing Price	Pure's Billing Price Plus Freight	SO (Ind.) Service Station Price at Duluth less Inspec. Fees & Taxes (*)		Margin Between Service Station Price & Pure's Billing Price Plus Freight
1935						
May	1	4.992	8.16		13.66	5.50
	3	5.292	8.46	(5-2)	13.96	5.50
	6	5.292	8.46		13.96	5.50
	7	5.292	8.46		13.96	5.50
	9	5.292	8.46		13.96	5.50
	10	5.292	8.46		13.96	5.50
	13	5.292	8.46		13.96	5.50
	15	5.292	8.46		13.96	5.50
	16	5.292	8.46		13.96	5.50
	17	5.292	8.46		13.96	5.50
	20	5.292	8.46		13.96	5.50
	21	5.292	8.46		13.96	5.50
	21	5.292	8.46		13.96	5.50
	23	5.292	8.46		13.96	5.50
	24	5.292	8.46		13.96	5.50
	24	5.292	8.46		13.96	5.50
	27	5.292	8.46		13.96	5.50
	28	5.292	8.46		13.96	5.50
	29	5.292	8.46		13.96	5.50
	31	5.292	8.46		13.96	5.50
June	3	5.292	8.46		13.96	5.50
	5	5.292	8.46		13.96	5.50
	6	5.292	8.46		13.96	5.50
	6	5.292	8.46		13.96	5.50
	10	5.292	8.46		13.96	5.50
	11	5.292	8.46		13.96	5.50
	12	5.292	8.46		13.96	5.50
	12	5.292	8.46		13.96	5.50
	13	5.292	8.46		13.96	5.50
	18	5.592	8.76	(6-14)	14.26	5.50
	19	5.592	8.76		14.26	5.50
	20	5.592	8.76		14.26	5.50
	24	5.592	8.76		14.26	5.50
	25	5.592	8.76		14.26	5.50
	26	5.592	8.76		14.26	5.50
	27	5.592	8.76		14.26	5.50
	28	5.592	8.76		14.26	5.50
July	1	5.592	8.76		14.26	5.50
	1	5.592	8.76		14.26	5.50
	2	5.592	8.76		14.26	5.50
	3	5.592	8.76		14.26	5.50
	5	5.592	8.76		14.26	5.50
	8	5.592	8.76		14.26	5.50
	10	5.592	8.76		14.26	5.50
	11	5.592	8.76		14.26	5.50
	11	5.592	8.76		14.26	5.50
	15	5.592	8.76		14.26	5.50
	16	5.592	8.76		14.26	5.50
	17	5.592	8.76		14.26	5.50
	19	5.592	8.76		14.26	5.50
	22	5.592	8.76		14.26	5.50

* Date shown in brackets is date service station price was changed.

NOTE: Billing price was usually determined as of date of order.
All prices represent cents per gallon.

Date Ordered	Pure's Billing Price	Pure's Billing Price Plus Freight	SO (Ind.) Service Station Price at Duluth less Inspec. Fees & Taxes (*)	Margin Between Service Station Price & Pure's Billing Price Plus Freight
1935				
23	5.592	8.76	14.26	5.50
24	5.592	8.76	14.26	5.50
25	5.592	8.76	14.26	5.50
26	5.592	8.76	14.26	5.50
29	5.592	8.76	14.26	5.50
30	5.592	8.76	14.26	5.50
30	5.592	8.76	14.26	5.50
31	5.592	8.76	14.26	5.50
Aug. 2	5.592	8.76	14.26	5.50
2	5.592	8.76	14.26	5.50
5	5.592	8.76	14.26	5.50
6	5.592	8.76	14.26	5.50
8	5.592	8.76	14.26	5.50
8	5.592	8.76	14.26	5.50
13	5.592	8.76	14.26	5.50
13	5.592	8.76	14.26	5.50
15	5.592	8.76	14.26	5.50
16	5.592	8.76	14.26	5.50
17	5.592	8.76	14.26	5.50
19	5.592	8.76	14.26	5.50
16	5.592	8.76	14.26	5.50
20	5.592	8.76	14.26	5.50
22	5.592	8.76	14.26	5.50
23	5.592	8.76	14.26	5.50
26	5.592	8.76	14.26	5.50
28	5.592	8.76	14.26	5.50
28	5.592	8.76	14.26	5.50
28	5.592	8.76	14.26	5.50
31	5.592	8.76	14.26	5.50
Sept. 4	5.592	8.76	14.26	5.50
4	5.592	8.76	14.26	5.50
5	5.592	8.76	14.26	5.50
9	5.592	8.76	14.26	5.50
9	5.592	8.76	14.26	5.50
12	5.592	8.76	14.26	5.50
13	5.592	8.76	14.26	5.50
18	5.592	8.76	14.26	5.50
18	5.592	8.76	14.26	5.50
20	5.592	8.76	14.26	5.50
23	5.592	8.76	14.26	5.50
24	5.592	8.76	14.26	5.50
25	5.592	8.76	14.26	5.50
28	5.592	8.76	14.26	5.50
30	5.592	8.76	14.26	5.50
Oct. 2	5.592	8.76	14.26	5.50
3	5.592	8.76	14.26	5.50
5	5.592	8.76	14.26	5.50
7	5.592	8.76	14.26	5.50
9	5.592	8.76	14.26	5.50
11	5.592	8.76	14.26	5.50
12	5.592	8.76	14.26	5.50

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NOTE: Billing price was usually determined as of date of order. All prices represent cents per gallon.

Date Ordered		Pure's Billing Price	Pure's Billing Price Plus Freight	SO (Ind.) Service Station Price at Duluth less Inspec. Fees & Taxes (*)		Margin Between Service Station Price & Pure's Billing Price Plus Freight
1935						
	12	5.592	8.76		14.26	5.50
	12	5.592	8.76		14.26	5.50
	14	5.592	8.76		14.26	5.50
	17	5.592	8.76		14.26	5.50
	18	5.592	8.76		14.26	5.50
	23	5.592	8.76		14.26	5.50
	25	5.592	8.76		14.26	5.50
	28	5.592	8.76		14.26	5.50
	30	5.592	8.76		14.26	5.50
Nov.	1	5.592	8.76		14.26	5.50
	4	5.592	8.76		14.26	5.50
	6	5.592	8.76		14.26	5.50
	7	5.592	8.76		14.26	5.50
	7	5.592	8.76		14.26	5.50
	12	5.592	8.76		14.26	5.50
	15	5.592	8.76		14.26	5.50
	15	5.592	8.76		14.26	5.50
	19	5.592	8.76		14.26	5.50
	22	5.592	8.76		14.26	5.50
	25	5.592	8.76		14.26	5.50
	23	5.592	8.76		14.26	5.50
	25	5.592	8.76		14.26	5.50
	26	5.592	8.76		14.26	5.50
	25	5.592	8.76		14.26	5.50
	30	5.592	8.76		14.26	5.50
Dec.	4	5.592	8.76		14.26	5.50
	5	5.592	8.76		14.26	5.50
	6	5.592	8.76		14.26	5.50
	11	5.592	8.76		14.26	5.50
	13	5.592	8.76		14.26	5.50
	11	5.592	8.76		14.26	5.50
	16	5.592	8.76		14.26	5.50
	19	5.592	8.76		14.26	5.50
	19	5.592	8.76		14.26	5.50
	24	5.592	8.76		14.26	5.50
	26	5.592	8.76		14.26	5.50
	27	5.592	8.76		14.26	5.50
	20	5.592	8.76		14.26	5.50
	30	5.592	8.76		14.26	5.50
	27	5.592	8.76		14.26	5.50
1936						
Jan.	2	5.592	8.76		14.26	5.50
	8	5.592	8.76		14.26	5.50
	9	5.592	8.76		14.26	5.50
	10	5.592	8.76		14.26	5.50
	14	5.592	8.76		14.26	5.50
	15	5.592	8.76		14.26	5.50
	20	6.092	9.26	(1-17)	14.76	5.50
	21	6.092	9.26		14.76	5.50
	24	6.092	9.26		14.76	5.50
	28	6.092	9.26		14.76	5.50
	30	6.092	9.26		14.76	5.50
	31	6.092	9.26		14.76	5.50

* Date shown in brackets is date service station price was changed.

NOTE: Billing price was usually determined as of date of order.
All prices represent cents per gallon.

Date Ordered	Pure's Billing Price	Pure's Billing Price Plus Freight	SO (Ind.) Service Station Price at Duluth less Inspec. Fees & Taxes (*)	Margin Between Service Station Price & Pure's Billing Price Plus Freight
1936				
Feb. 3	6.092	9.26	14.76	5.50
5	6.092	9.26	14.76	5.50
6	6.092	9.26	14.76	5.50
10	6.092	9.26	14.76	5.50
12	6.092	9.26	14.76	5.50
15	6.092	9.26	14.76	5.50
18	6.092	9.26	14.76	5.50
20	6.092	9.26	14.76	5.50
21	6.092	9.26	14.76	5.50
26	6.092	9.26	14.76	5.50
27	6.092	9.26	14.76	5.50
Mar. 3	6.092	9.26	14.76	5.50
4	6.092	9.26	14.76	5.50
6	6.092	9.26	14.76	5.50
9	6.092	9.26	14.76	5.50
11	6.092	9.26	14.76	5.50
10	6.092	9.26	14.76	5.50
17	6.092	9.26	14.76	5.50
20	6.092	9.26	14.76	5.50
13	6.092	9.26	14.76	5.50
25	6.092	9.26	14.76	5.50

* Date shown in brackets is date service station price was changed.

NOTE: Billing price was usually determined as of date of order. All prices represent cents per gallon.

The above information is obtained from Exhibit "A" (R. pp. 246, 279-394) attached to answers by The Pure Oil Company to interrogatories and Exhibits "X" and "W" introduced in evidence by petitioner. (R. pp. 246, 260; 221, 261.) The service station price of gasoline shown on Exhibit "X" for November 13, 1934, continued to February 2, 1935. (R. p. 246.) In the above analysis taxes and inspection fee in the aggregate amount of 4.04¢ have been deducted from the service station price. (R. p. 221.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 227.

TWIN PORTS OIL COMPANY, A CORPORATION,
Petitioner,

vs.

THE PURE OIL COMPANY,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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CASE NOT TRIED ON MARGIN THEORY

In respondent's brief the granting of the writ is objected to because it is claimed that the case was tried on the margin theory and that, there being no disproportionate increase between the tank car price rise at Tulsa and the retail prices at Duluth, petitioner was not damaged.

The case was *not* tried on the margin theory. The margin theory was in the case originally, being based upon one of the Madison convictions—Madison Case No. 2, the jobber-margin case.

The *original* complaint alleged the tank car price-fixing (Paragraph 30, R. 15) without any reference to "no proportionate increase" in retail prices (Paragraph 30, R. 15) but the complaint *also* alleged that prices were increased at Group III, the Tulsa area, without a proportionate increase in retail prices at Duluth (Paragraph 34, R. 16-17). This

was based upon the margin theory and based upon the judgment of guilt in Madison Case No. 2, the *nolo contendere* case.

The indictment in Madison Case No. 2 (R. 44) charged that there *was* a conspiracy to fix and regulate *margins* (R. 51-52).

But before the trial Madison Case No. 2 was stipulated *out of the case* and the complaint was amended to bring this about.

This answers the margin theory. There was left and tried the price-fixing case, permissible under paragraph 16 (R. 70-71), amended, amended complaint). But the evidence as to the $2\frac{1}{4}¢$ illegal exaction was received without objection (R. 228, 236).

The claim that the *statements* to the Court preceding the amendment of the complaint *limited* the effect of the *amendment* is not sound. Inasmuch as the amendment was *permitted*, the *amendment* governs. It cannot be *interpreted* by nor *modified* by any colloquy between Court and counsel.

However, in urging the Court to permit the amendment, counsel for petitioner stated that by the amendment petitioner sought a recovery upon "both" theories,—that is, the margin theory *and* the *price-fixing* theory (R. 105-106).

After the decision in *United States vs. Socony Vacuum Oil*, 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811, wherein, in a footnote, examples were given showing a disproportionate increase between tank car prices and retail prices of some 3/8ths of a cent, petitioner, to make sure its case would *not be determined solely on the margin theory* sought, and the Court permitted, the amended paragraph 22 (R. 72-73). This is the paragraph which states that there was a *price increase* and from which the allegation of *proportionate* increase, as appeared in the original complaint (Paragraph 34, R. 16-17) was *eliminated*.

Paragraph 34 of the original amended complaint (R. 16) starts out as follows: "That at all times herein set forth there was a good, adequate, sufficient and normal supply of crude oil and gasoline on hand."

This is followed by the allegations as to difference between tank car prices and retail prices, and in the 11th and 12th lines of paragraph 34 (R. 17) the words "proportionate increase" appear. This allegation was drawn with the margin theory in mind and at the time Madison Case No. 2, the margin case, was in the picture.

But the amended, amended complaint changed this situation. Paragraph 21 of the amended, amended complaint (R. 72) starts out the same as paragraph 34 of the original amended complaint—"That at all times herein set forth there was a good, adequate, sufficient and normal supply of crude oil and gasoline on hand." Paragraph 21 continues as did paragraph 34 of the original complaint (R. 16-17) with allegations that there was no reason for the advance in tank car prices, but the words "proportionate increase" do not appear in paragraph 21; neither do they appear in paragraph 22 (R. 72-73).

It is true that in paragraph 22 the word "margin" appears. This word is used loosely, but paragraph 22 (R. 72) does contain the language: "The tank car prices of gasoline were caused to be and were increased by said defendants at said basic price area" (R. 72).

Paragraph 22 alleges that plaintiff was damaged in the sum of 2¢ per gallon "for each gallon of gasoline sold by it by reason of said conspiracy." There was a plain typographical error here. The word "sold" should have been "purchased." But regardless of the pleadings, the proof of the conspiracy and the proof that it caused the illegal price rise of 2¼¢ went into the record without objection and, under the liberal rules, the pleadings must be deemed to have

been amended to conform to the facts proven.

The record showed the *purchase* by petitioner. It is silent as to *sold* by petitioner. Here, again, the liberal rules come into play fitting the pleadings automatically to the facts.

Despite the fact that the "margin" case, Madison Case No. 2 was stipulated out of the case, the word "margin" was not wholly eliminated in the pleadings. There was a possibility, too, of some marginal proof, although petitioner did not rely on this, certainly not after the testimony of John Cox (R. 228, 236). However, any allegations as to margin must be treated as surplusage.

And, again, we go back to the proposition that the evidence of the illegal exaction was received without objection as beyond the pleadings or stipulation and the pleadings must be treated as amended to conform to the facts.

As showing the pleader's attempt to protect itself in paragraph 36 (R. 75), it is alleged that "plaintiff sold one million, six hundred ten thousand, one hundred thirty-five (1,610,135) gallons of gasoline," and then it is alleged that "because of said conspiracy *and* the narrowed margin" plaintiff was damaged "to the extent of $0.0204 per gallon."

Here there is an allegation of damage because of the conspiracy, which is the price-fixing conspiracy, *and* the narrowed margins. The two conspiracies were clearly in the pleader's mind. One of them was proven.

The same thing applies in paragraph 38 (R. 76) where it is alleged that "by reason of all the facts aforesaid *and the effect of said conspiracy* this *plaintiff* was * * * *injured* in its business and property."

Here the word "conspiracy" in the singular is used. The same thing is true in paragraph 39 (R. 77) where the word "conspiracy" appears. At the outset there were the two conspiracies, the price-fixing conspiracy and the jobber-margin

conspiracy, Madison Case No. 2. The parties eliminated Madison Case No. 2.

If there be some inaccuracies or some looseness appears in the pleadings, this becomes of little moment when the facts were received without objection and, particularly, is this of little moment in view of the liberal new rules as to pleadings. (See *Stevens vs. Foster*, 61 S. Ct. 210.)

During the trial of the case the word "margin" was used by counsel and witnesses, but *at no place was there a direct claim that the petitioner's right to recover was a 2¼¢ marginal difference between prices before and after the conspiracy;* that is a claim of *that* difference between retail prices and tank car prices. The claim was the illegal exaction of 2¼¢ per gallon.

The price-fixing conspiracy started in February, 1935 (Indictment, R. 36-37).

The jobber-margin case, Madison Case No. 2, charged a conspiracy starting in 1931 (Paragraph 11, R. 51).

The *petitioner* did not offer any *selling* prices in evidence. These were offered at the instance of the *Pure Oil Company.*

> "Mr. Searls: *I* want to offer all of the *selling* prices shown on this Exhibit A, attached to our answers of those interrogatories" (R. 130).

Following this the record shows—

> "Mr. Michel: I am not going to offer them" (R. 130).

Little attention was paid to margin during the trial, except with the idea of *explaining* the whole situation.

The margin theory was merely in the case *as a part of the picture.* It appeared that in 1935 and 1936 the margin of petitioner was 1.434 (R. 154).

The following quotation is illustrative as to the mere explanatory nature of the margins:

"Mr. Michel: What margins did you receive for handling gasoline, let us take some six or seven years previous to (fol. 213, R. 155) this buying program period.

Mr. Searls: I *object* to that * * *.

Mr. Michel: Oh, no—as bearing upon the prices and what you should have *paid*, we have a right to go back a reasonable number of years *to show how business was ordinarily conducted in an ordinary open and free market*" (R. 155).

See *Straus vs. Victor Talking Mach. Co.*, 297 Fed. 791.

The following also occurred:

"Mr. Michel: No. We want to go back a sufficient number of years to show that when *purchases* were made in *a free and open market not hampered by the buying programs* or the conditions that existed, what the margins were, as compared to what the margins were here, and it will be followed with further testimony. I think it is clearly material to show what they *normally* get" (R. 156).

To the above counsel for the Pure Oil Company objected. We quote from the Record:

"Mr. Searls: I would like the record to show further that that would be *too remote* to him and that you cannot establish facts of injury or facts of damages *by going back to some prior year* when the *claim* in regard to the conspiracy *relates to 1935 and 1936*, and he has got to look to *those* years to see what occurred and not the fact as to *what he might have received in 1926*, that would have no bearing upon what he would receive in 1935 and it would be entirely too remote and conjectural" (R. 156).

The margin conspiracy started in 1931 (R. 51).

The Court sustained the objection as to previous margins, even upon the explanatory theory (R. 156). So that up to that point certainly margins were not in the case. However,

the Court did permit general testimony that a jobber had to receive a margin of from 3 to 3½¢ per gallon in order to operate successfully (R. 157).

Perhaps upon this testimony alone some damage appears, under the doctrine of *Rankin vs. Associated Billposters*, 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167; also 42 Fed. (2d) 152, Cert. denied 282 U. S. 864, 75 L. Ed. 765, and certainly from the above, it appears that upon some theory this damaged jobber had a right of action.

When the testimony as to the *effect* of the buying programs went into the record without *objection* (R. 228-236), petitioner *quit*, so far as showing any further or other *effects* of the conspiracy. Other than the cross-examination of John Cox and some other and general explanatory testimony by Milan Lubratovich (R. 237-249) plus offering of exhibits, petitioner's testimony closed with the 2¼¢ "floor" testimony of John Cox so far as the effect of the buying programs was concerned.

The testimony of John Cox was that the buying programs *raised the price* of gasoline to the petitioner and put a *"floor" under the market* of 2¼¢ per gallon (R. 228-236). This *made a case* for petitioner under *Chattanooga Foundry vs. City of Atlanta*, 203 U. S. 390, 51 L. Ed. 241, 27 S. Ct. 65.

Respondent recognized this situation. This is shown by its cross-examination of John Cox on the price rise. He had testified that the buying programs put a "floor" of 2¼ cents under the tank market prices (R. 228-236).

We quote from the cross-examination:

> "Q. It is very important to you personally to have a (fol. 316) precedent established giving a jobber *a right to recover by reason of these buying programs* you have referred to?
>
> A. No. I think the *buying program* is of very *little* interest to *me*.
>
> Q. You have consulted attorneys about bringing a suit *by reason of those buying programs?*

A. Yes.

Q. And the *character of suit* you would bring would be a suit *similar* to the one that is being prosecuted here?

A. Yes, but *the point you are asking me about doesn't enter into my case*" (R. 228-229).

And further:

"Q. Just a minute. Answer my question. My question was this: You are very interested in having a precedent established *giving a jobber the right to recover by reason of these buying programs* you have referred to?

A. I think I answered that.

Q. Is it yes or no?

A. It is neither. My interest—" (R. 229).

Again from the cross-examination of John Cox we quote:

"A. My case is a *different kind of a case;* it doesn't have this question.

Q. But you will be claiming damages *by reason of these buying programs* you referred to?

A. I am claiming damages because of monopoly (fol. 318).

Q. You will be claiming damages *by reason of these buying programs* you have testified about?

A. *Not in the way that the Twin Ports case is being presented*" (R. 230).

When the John Cox testimony was concluded, petitioner had shown a cause of action for the illegal exaction of 2¼¢ per gallon, and while the word "margin" had appeared in the pleadings and in the testimony, *the moment petitioner felt it had proven a case for the 2¼¢ illegal exaction*, petitioner *ceased any efforts to make further proof* as to its damages, save the testimony of Milan Lubratovich as to values.

Petitioner felt its case was proven; the John Cox testimony went in without objection as to being beyond the pleadings or the stipulation. Excerpts from the record following the

John Cox testimony show no evidence in an attempt to bolster the claim of a marginal damage nor any damage because of the judgment of guilt in Madison Case No. 2, the jobber-contract case.

RESPONDENT CHANGES ITS THEORY

When this case was presented to the Circuit Court of Appeals it must have become *evident* to respondent that *it could not sustain the trial court's position*, wherein he stated:

> "It is uncontradicted in the evidence that the *price* of gasoline to the jobber *as a result of this conspiracy was increased*, but it is also uncontradicted in the evidence that the retail price of gasoline assumed a corresponding increase, at least in so far as the Twin Ports Oil Company was concerned, and that any increase to the Twin Ports Oil Company in the price of gasoline was *passed on to the retailer*" (R. 253-254).

Under the cases of *Southern Pacific Co. vs. Darnell-Taenzer Lbr. Co.*, 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186, and *Adams vs. Mills*, 286 U. S 397, 76 L. Ed. 1184, 52 S. Ct. 589, the "passed on to the retailer" theory urged upon the trial court by respondent, and which theory he accepted, is clearly untenable.

Respondent urged and the Circuit Court impliedly conceded that this *was the rule* in cases under the Interstate Commerce Act, but said that the same rule did *not apply* in cases under the Sherman Act. (See the two statutes, page 35 of petition herein.)

And the respondent convinced the Circuit Court of Appeals that there *was a difference* between these two statutes. Clearly, for purposes of statutory construction the statutes are the same.

The Circuit Court accepted respondent's contention and

attempted to *distinguish* the Darnell and Adams cases because of the claimed difference in the statutes.

Respondent in its brief in the Circuit Court of Appeals strongly urged this point. But *now*, in objecting to the granting of the writ, respondent *does not attempt to sustain the untenable position taken by the Circuit Court*—that the Darnell and Adams cases are not controlling because of the *differences in the statutes* under consideration.

This contention of inapplicability of the Darnell and Adams cases *was the point* upon which respondent *prevailed* in the Circuit Court.

The Circuit Court said:

> "Therefore, appellant *was constrained* to *base its claim to recover* upon rules announced in cases involving *fundamentally differing enactments* and distinctive grounds for relief. In this connection its counsel cite specifically *Southern Pacific Company, et al., vs. Darnell-Taenzer Lumber Company, et al.*, 245 U. S. 531, and *Adams vs. Mills*, 286 U. S. 397" (R. 342).

It will be seen that the Circuit Court said the "claim to recover" was based upon "rules announced in cases," etc.

If the rule in the Darnell and Adams cases does *not* apply, that is one thing, but if that rule *does* apply, the "passed on to the retailer" theory must fall. Then the decision of the Circuit Court is *based upon an unsound premise*, to-wit: that there is a *difference* in the damage section of the Interstate Commerce Act and the Sherman Act—*not* the margin theory.

A mere reading of the two statutes (page 35 of Petition herein) shows that they are *substantially the same* in the matter of damages, *full* damages in one case and *threefold* in the other.

Respondent prevailed upon a wrong theory in the Circuit Court of Appeals.

Viewing this case from any angle, it should go back for

a determination by the tribunal Congress intended to have try questions of fact. The Supreme Court of the United States has said that this tribunal is the jury, in cases under the Sherman Act.

Story Parchment vs. Paterson Parchment Paper Co., 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248.

Respectfully submitted,

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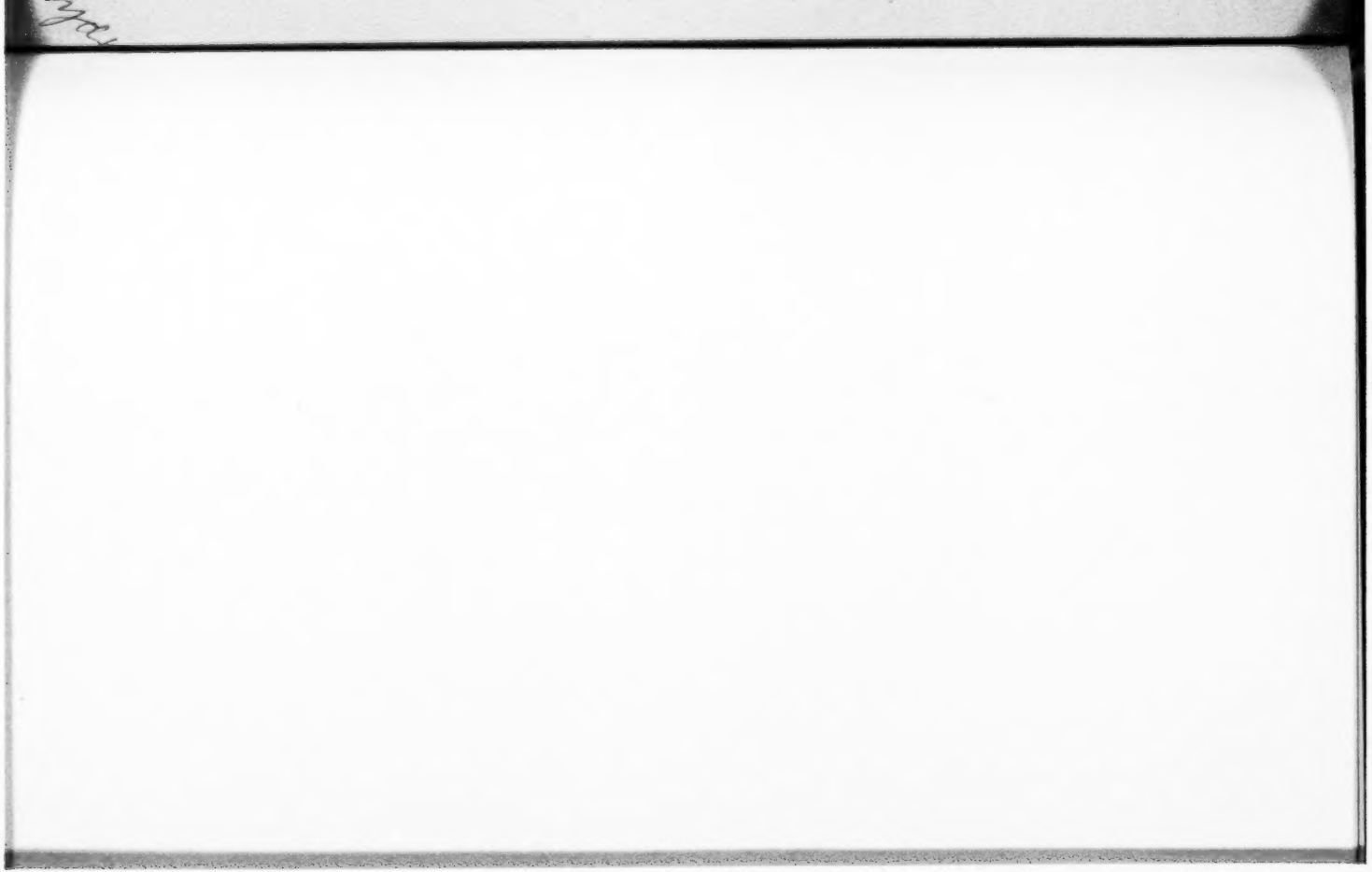

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To the Honorable, the Supreme Court of the United States:

Comes now the Twin Ports Oil Company and asks that this Court reconsider the petition for a writ of certiorari herein, and respectfully shows to this Court:

That the decision of the Circuit Court of Appeals not only held that this case was tried on the margin theory, but also held that petitioner tried the case on the illegal exaction theory, the Court saying:

> "Therefore, appellant was *constrained to base its claim to recover upon rules announced in cases involving fundamentally differing enactments and distinctive grounds for relief.* In this connection its counsel cite specifically *Southern Pacific Company, et al., vs. Darnell-Taenzer Lumber Company, et al.*, 245 U. S. 531, and *Adams vs. Mills*, 286 U. S. 397. The first of these cases involved an order by the Interstate Commerce Commission of reparation for unreasonable freight charges, and the carrier was directed to pay such charges to the one

who had paid the unreasonable excess, as the proximate loser, without following each transaction to its ultimate result."

That the decision of the Circuit Court of Appeals, if not reversed, will stand as a precedent for this proposition of law, to-wit:

If a purchaser is *forced to pay an excessive and illegal amount because of a conspiracy to violate the Sherman Law* (*Chattanooga Foundry Co. vs. City of Atlanta*, 203 U. S. 390, 27 Sup. Ct. 65), the fact that the purchaser might get the increase back, or pass it on to the retailer constitutes a defense.

This Court has said in two cases—*Adams vs. Mills*, 286 U. S. 397, 76 L. Ed. 1184, 52 Sup. Ct. 589, and *Southern Pacific Co. vs. Darnell-Taenzer*, 245 U. S. 531, 62 L. Ed. 451, 38 Sup. Ct. 186, that the fact that plaintiffs were able to pass on the damages to subsequent purchasers *would not constitute a defense.*

The Adams and Darnell cases were based upon the Interstate Commerce Act. The Circuit Court of Appeals conceded the correctness of those decisions, but held that a *different* rule applied in cases under the Sherman Law. The damage portions of the two statutes are practically the same.

In the United State District Courts in the state of Minnesota actions by some forty jobber plaintiffs are now pending to recover damages because of losses they sustained by reason of the conspiracy for which defendant and other major oil companies were held guilty. (*U. S. vs. Socony Vacuum Oil*, 310 U. S. 150, 84 L. Ed. 1129, 60 Sup. Ct. 811.)

While we realize that the denial of a petition for a writ of certiorari imports no opinion on the merits of the case, nevertheless, the decision in the present case by the Circuit Court of Appeals *stands as authority* for this:

If there be an illegal exaction, due to a violation of the

Sherman Act, the fact that the exaction was or might be passed on to the public constitutes a defense.

This, under the decisions in the Adams and Darnell cases, does *not* constitute a defense. Those cases were under the Interstate Commerce Act, a statute, so far as damages are concerned, practically the same as the Sherman Act.

In the cases of the some forty jobber plaintiffs pending in Minnesota the jobbers will be confronted with the decision of the Circuit Court of Appeals as holding that the fact that the increase might be passed on to the retailer constitutes an absolute defense.

It may be that in denying the writ herein this Court was of the opinion that the present case was tried on the margin theory, but the decision of the Circuit Court of Appeals went further and squarely held that a jobber could not recover for an illegal exaction charged against it, if it did, or might have, passed this exaction on to the public.

The Circuit Court went beyond the margin theory. It considered the illegal exaction of 2¼ cents per gallon but held the Adams and Darnell cases to be inapplicable, even assuming the illegal exaction.

To the end that the decision of the Circuit Court of Appeals in this case be brought into harmony with *Southern Pacific vs. Darnell*, 245 U. S. 531, 62 L. Ed. 451, 38 Sup. Ct. 186, and *Adams vs. Mills*, 286 U. S. 397, 76 L. Ed. 1184, 52 Sup. Ct. 589, we file this *unusual request* for reconsideration of the petition for certiorari.

This application is filed with the full knowledge that it is of a type which rarely is granted and which in most instances should not be granted.

We cannot but feel that the confusion which may have arisen as to whether this case was tried solely on the margin theory may have been the cause of the denial of the petition.

The instant case, in and of itself, is important, but of little

importance compared to the cases of some forty jobber plaintiffs who now face a situation where the decision of the Circuit Court of Appeals must be taken as final authority in the Eighth Circuit, to the effect that if an illegal exaction was or might be passed on to the public, that would constitute a defense in an action under the Sherman Law. Such is *not* the law in this Court, and the *wrongful precedent* set by the Circuit Court should not control future litigation.

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